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No. 97-843

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

Aurelia Davis, as next friend of LaShonda D.,

Petitioner,

v.

Monroe County Board of Education, *et al.*,

Respondents.

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On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in federally funded education programs and activities, recognizes a cause of action for peer hostile environment sexual harassment.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Aurelia Davis, as next friend of her daughter, LaShonda D., and the Respondents Monroe County Board of Education, Bill Querry, and Charles Dumas.

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OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is reported at 120 F.3d 1390 (11th Cir. 1997). Pet. App. at 1a. The opinion of the three-judge panel of the Court of Appeals

is reported at 74 F.3d 1186 (11th Cir. 1996). Pet. App. at 62a. The order vacating the three-judge panel decision and granting the petition for rehearing *en banc* is reported at 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 91a. The opinion of the district court in this case is reported at 862 F. Supp. 363 (M.D. Ga. 1994). Pet. App. at 82a.

JURISDICTION

The Court of Appeals entered its judgment on August 21, 1997. Petitioner timely filed her petition for writ of certiorari on November 19, 1997, which was granted by this Court on October 6, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") is set forth below:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

STATEMENT OF THE CASE

A. Introduction

Petitioner Aurelia Davis brings this action against the

Monroe County Board of Education ("Board"),[1] on behalf of her minor daughter, LaShonda D. Mrs. Davis alleges that LaShonda was sexually harassed in school by another student and that the Board knowingly tolerated, condoned, and was deliberately indifferent to the misconduct, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, *inter alia*.[2] The district court dismissed her suit, holding that Title IX does not cover a school's failure to address or remedy peer hostile environment sexual harassment. A divided three-judge panel of the court of appeals reversed, ruling that Title IX requires educational institutions to address instances of student-to-student sexual harassment of which they knew or should have known. Sitting *en banc*, a divided court of appeals vacated that decision and affirmed the judgment of the district court.

B. Background Facts

Mrs. Davis' claim arises out of a five-month pattern of sexual harassment targeting LaShonda, repeated complaints by LaShonda and her mother to school officials about it, and the school's refusal to take any meaningful actions to stop the misconduct. The unchecked harassment began in December 1992, when LaShonda was a fifth-grade student at Hubbard Elementary School in Forsyth, Georgia, and persisted until May of 1993, diminishing LaShonda's academic performance and her emotional well-being in the

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[1] The Board is a recipient of federal financial assistance and therefore covered by Title IX. Pet. App. at 99a.

[2] The complaint also alleged individual claims against Superintendent Charles Dumas and Principal Bill Querry, and additional claims against the Board for violation of LaShonda's constitutional rights and for racial discrimination. However, only the Title IX claim against the Board is properly before this Court.

process. Pet. App. at 95a, 97a, 100a.

In the first of several instances, starting in December of 1992, a classmate identified as "G.F." repeatedly attempted to touch LaShonda's breasts and vaginal area and told her in vulgar terms that he "want[ed] to feel her boobs" and "want[ed] to get in bed" with her. *Id.* Both LaShonda and her mother reported these incidents to classroom teacher Mrs. Diane Fort. *Id.* at 96a. In January 1993, Mrs. Fort assured Mrs. Davis that the principal had been informed about the harassment. *Id.* at 96a.

The harassment continued, as did the complaints and requests for assistance by LaShonda and Mrs. Davis. In February 1993, G.F. placed a doorstop in his pants and behaved in a sexually suggestive and harassing manner. *Id.* This time, LaShonda and her mother complained to Coach Whit Maples and Mrs. Joyce Pippin, the teachers in whose classes this misconduct occurred. *Id.* In March 1993, LaShonda and other girls whom G.F. had sexually harassed tried to arrange a meeting with Principal Querry, but Mrs. Fort refused to allow them to proceed, stating "[i]f he wants you, he'll call you." *Id.* In April 1993, G.F. rubbed against LaShonda in a sexual manner in the school's hallways as the students went to lunch. *Id.* LaShonda reported this incident as well to Mrs. Fort. *Id.* In an attempt to avoid contact with G.F., LaShonda also repeatedly asked Mrs. Fort during this period to change her assigned seat next to the boy; however, Mrs. Fort denied these requests for over three months. *Id.* at 97a.

By May 1993, G.F.'s sexual harassment of LaShonda had persisted for five months; school officials still had not responded to her requests for help. *Id.* LaShonda told her mother at that time that she "didn't know how much longer

she could keep [G.F.] off her." *Id.* at 96a-97a. Mrs. Davis then contacted Principal Querry directly to urge him to take specific action to protect her daughter. *Id.* at 97a. Mr. Querry responded by saying he "guess[ed he would] have to threaten [G.F] a little bit harder," and asking LaShonda "why she was the only one complaining." *Id.* With no response forthcoming from the school, in May 1993, G.F. was charged with and pled guilty to sexual battery. *Id.*

Throughout this five-month pattern of sexual harassment, neither the teachers nor the Board ever disciplined G.F. *Id.* In addition, the Board had no policy prohibiting the sexual harassment of students in its schools at this time; nor did it have any plan of action or guidance to assist employees in handling, or students in reporting, such misconduct. *Id.* at 98a. Additionally, the Board did not provide any training to its employees instructing them on how to respond to incidents of sexual harassment of students. *Id.*

The sexual harassment LaShonda endured, and the refusal of the school to take steps to end it, interfered with her ability to benefit from the education the Board provided at Hubbard. *Id.* at 100a. LaShonda's ability to concentrate diminished, causing her grades, previously all A's and B's, to suffer. *Id.* at 97a. In addition, the harassment affected her mental and emotional well-being, as evidenced by a suicide note she wrote, which her father found in April 1993. *Id.*

C. Proceedings Below

Mrs. Davis filed a complaint against the Board in the United States District Court for the Middle District of Georgia on May 4, 1994, alleging, *inter alia,* a violation of Title IX and seeking equitable relief and compensatory

damages. Pet. App. at 93a.

The district court dismissed Mrs. Davis' claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure on August 29, 1994. The court concluded that the Board's failure to respond to the repeated complaints of Mrs. Davis and LaShonda did not violate Title IX because "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994). Pet. App. at 88a. The district court found that because neither the Board nor its employees "had any role in the harassment . . . any harm to LaShonda was not proximately caused by a federally funded education provider." *Id.*

On February 14, 1996, a divided panel of the Eleventh Circuit Court of Appeals reversed the district court's decision. The panel held that Title IX encompasses a cause of action when a school district fails to address and remedy a hostile environment created by a student's sexual harassment of which it knew or should have known. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188 (11th Cir.), *vacated and reh'g granted*, 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 62a.

The Eleventh Circuit vacated the panel decision and granted the Board's petition for rehearing *en banc* on August 1, 1996. *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 91a. On August 21, 1997, the Eleventh Circuit, sitting *en banc*, held that Title IX does not recognize a cause of action for peer hostile environment sexual harassment. The court found that Congress neither intended nor provided sufficient notice for educational institutions to be held liable for this form of sex

discrimination under Title IX. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997). Pet. App. at 1a. Four judges dissented, noting that the majority's decision conflicts with Title IX's language and legislative history, as well as with the precedents of this Court. *Id.* at 46a.

SUMMARY OF ARGUMENT

1. Title IX's broad proscription against sex discrimination encompasses student-to-student sexual harassment, as evidenced by the statutory language, its legislative history, and this Court's decisions interpreting the statute.

The plain language and legislative history of Title IX, 20 U.S.C. § 1681 *et seq.*, support Title IX coverage for student-to-student sexual harassment. Title IX has broad statutory language, prohibiting sex discrimination, including sexual harassment, in federally funded education. Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which proscribes specific acts by employers, Title IX focuses on protecting individuals from discrimination, requiring recipients to ensure that individuals are not "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" their education programs or activities. Accordingly, when a recipient fails to address or remedy sexual harassment, whether initiated by a student or a teacher, it violates the terms of the statute on its face.

Title IX's legislative history supports this reading of the statute. Congress enacted Title IX with the goal of ending the "corrosive and unjustified discrimination" confronting women and girls in education. 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). In this connection, Congress heard evidence regarding discrimination by non-

agents that limits the educational opportunities available to female students. Lawmakers thus drafted Title IX to be both "strong and comprehensive," in order to eliminate such practices. *Id.* at 5804. Congress has reaffirmed that intention several times. First, Congress reviewed and approved Title IX's implementing regulations, which hold recipients responsible for discrimination that occurs "under" their education programs or activities, even when committed by someone other than the recipient. In addition, Congress enacted provisions preserving the broad scope of Title IX following decisions by the Court that would have narrowed the statute's coverage, passing the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, and the Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687. The repeated, consistent expressions of Congress' intent, particularly in light of the fact that lawmakers were aware of Title IX coverage of discrimination perpetrated by persons other than agents of educational institutions, make clear that Title IX's proscription against sex discrimination encompasses student-to-student harassment.

This Court's decisions in *Gebser v. Lago Vista Ind. Sch. Dist.*, 520 U.S. 397, 118 S. Ct. 1989 (1998), and *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) also support Title IX coverage of student-to-student sexual harassment. Consistent with this Court's prior rulings interpreting Title IX broadly, these decisions recognize a damages cause of action for sexual harassment. In contrast, the court below concluded erroneously that the Spending Clause requires Congress to articulate each and every cause of action that might arise under a particular statute, and that since Title IX is silent on the matter, Congress did not provide recipients with sufficient notice to be liable for peer harassment. *Gebser* and *Franklin* make plain that Title IX's broad and unambiguous proscription against sex

discrimination provides ample notice to recipients for Spending Clause purposes.

Gebser and *Franklin* also make clear that educational institutions may be held liable for peer harassment under Title IX for their own response to a sexually hostile environment, irrespective of whether it is created by teachers or students. The court below attempts to distinguish teacher-to-student harassment from peer harassment based on the fact that teachers are agents of institutions and students are not. Under *Gebser* and *Franklin*, however, institutional liability is based on the recipient's failure to ensure that students are not denied the benefits, excluded from, or subjected to discrimination under the education program, and not on whether the perpetrator had an agency relationship with the institution. Thus, when an institution turns its back on sexual harassment—whether by a teacher or a student—it violates the statute and must be held liable.

2. The Department of Education ("DOE") consistently has interpreted Title IX as covering student-to-student sexual harassment, which is entitled to deference. DOE has long required recipients to remedy sex discrimination emanating from third parties, including students, in their programs through regulations and policies. In addition to promulgating regulations requiring recipients to address discrimination by third parties, DOE has issued extensive policy guidance on sexual harassment generally, including peer harassment. *See "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Final Policy Guidance,"* 62 Fed. Reg. 12,034 (Mar. 13, 1997) (*"Sexual Harassment Guidance"*). The Guidance recognizes peer harassment as a violation of Title IX and requires schools to take prompt,

immediate action to remedy it and prevent its recurrence. Similarly, the enforcement actions of DOE's Office for Civil Rights (OCR) also have long required recipients to remedy sexually hostile environments created by students. These policies are premised on the obligation recipients have under Title IX to ensure that students are not subjected to discrimination, and not on the identity of the harasser.

The Department also recognizes Title VI as covering student-to-student harassment, which further supports Title IX coverage of peer harassment. DOE issued a policy guidance on student-to-student racial harassment, which, just as the Sexual Harassment Guidance, requires institutions to take prompt, appropriate steps to remedy such discrimination. *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,449 (1994). This guidance makes clear that, just as in the Title IX context, recipients have an obligation under Title VI to ensure that students are not subjected to race discrimination occurring under their programs. Courts recognized this obligation before Title IX was enacted in the context of evaluating school responses to desegregation orders, and most recently in the Ninth Circuit, *Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998). The fact that Title VI also covers peer harassment strongly militates in favor of recognizing this cause of action since Title IX was modeled on Title VI.

3. Petitioner Davis has stated a claim for relief under Title IX. Mrs. Davis has alleged that LaShonda was subjected to a five-month pattern of severe and pervasive sexual harassment repeatedly in school, and that, despite LaShonda and her mother's repeated complaints to teachers and the principal, no meaningful action was taken to address

or remedy the misconduct. Thus, because the Board had notice of the harassment, and responded to it with deliberate indifference, Mrs. Davis has stated a claim for damages under Title IX. Equitable relief also is appropriate in a case such as this one, where the school lacked policies and procedures to address sex discrimination, and where assurance of nondiscrimination in the future is needed.

ARGUMENT

I. TITLE IX'S BROAD PROHIBITION AGAINST SEX DISCRIMINATION COVERS STUDENT-TO-STUDENT SEXUAL HARASSMENT.

A. Title IX's Plain Language and Legislative History Support Covering Student-to-Student Sexual Harassment.

1. The Statutory Language is Broad.

Congress enacted Title IX to prohibit sex discrimination in federally funded education programs and activities. By its own terms, Title IX's proscription against sex-based discrimination is both direct and expansive, stating simply:

> No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). By its broad terms, Title IX neither

enumerates the specific forms of discriminatory conduct, nor does it specify the particular actors, that fall within its broad proscription. Instead, Title IX requires educational institutions to ensure that students and others are not subjected to discrimination occurring under their programs or activities, a requirement that most assuredly is breached when an institution refuses to remedy sexual harassment, which the Court already has recognized as a form of sex discrimination that Title IX forbids. *See Gebser v. Lago Vista Indep. Sch. Dist.* 520 U.S. 397, 118 S. Ct. 1989 (1998) (recognizing a cause of action of damages for teacher-to-student sexual harassment); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (same).[3]

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[3] Sexual harassment interferes with students' ability to benefit from and fully take advantage of their educational opportunities and experiences. This interference manifests itself in a variety of ways. For example, students who have been sexually harassed may stay away from school, refuse to participate in certain school programs, classes or activities, or even transfer to a different school in an attempt to avoid the source of harassment. *See Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (4th Cir. 1997), *vacated, reh'g en banc granted* (Feb. 5, 1998); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1566 (N.D. Cal. 1993), *modified on other grounds* 949 F. Supp. 1415 (N.D. Cal. 1996); *Oona R.-S. v. Santa Rosa City Sch.*, 890 F. Supp 1452 (N.D. Cal. 1995), *aff'd sub nom. Oona R.-S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), *withdrawn, superseded, and amended on denial of reh'g by* 143 F.3d 473, 476 (9th Cir. 1998), *and petition for cert. filed*, 67 U.S.L.W. 3083 (U.S. June 19, 1998) (No. 98-101). Their grades may drop. *See Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64 (D.N.H. 1997); *Modesto City Sch.*, OCR Case No. 09-93-1391. Emotional and psychological effects of the sexual harassment, such as fear, isolation and depression have an adverse impact on student learning. *See* Myra and David Sadker, *Failing at Fairness: How America's Schools Cheat Girls* (1994).

This interference with students' educational opportunities is only amplified when schools refuse to respond to instances of sexual harassment. Students learn that voicing their complaints will not end the

This Court has held that Title IX should be accorded "a sweep as broad as its language" in order to give the statute "the scope its origins dictate." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). For example, the Court has held that Title IX's protection against sex discrimination applies to employees, in part because the plain language "on its face [appears] to include employees as well as students." *Id.* at 520. The Court found that since the statute neither expressly includes nor excludes employees from coverage, it "should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary." *Id.* at 521.

Title IX similarly does not limit its proscription against discrimination to actions initiated "by" recipients, rather than third parties such as students. The basic construction of Title IX itself makes clear that whether a student is the perpetrator of the sexual harassment or whether it was caused by another party in the first instance, Title IX requires educational institutions to address and remedy such discrimination. The statute focuses on the harm done to the individual in the educational program, not the identity of the person whose initial actions caused the discrimination with which it is confronted. Title IX's construction thus demonstrates Congress' intention that individuals be protected from sex discrimination if it takes place "under"

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harassment. Students learn that voicing their complaints will not end the harassment. They may lose respect for the adults in charge of their learning environment, or they may be disciplined themselves. *See generally* Nan Stein, *et al.*, *Secrets in Public: Sexual Harassment in Our Schools* (1992). Thus, when schools do not respond promptly and appropriately to sexual harassment, students are deprived of their educational opportunities and experiences.

the educational program, or if it causes educational benefits to be denied, or exclusion to result, whatever the discrimination's initial source. Moreover, the fact that Title IX "neither expressly nor impliedly excludes" this form of sex discrimination from its reach, counsels in favor of "interpret[ing] the provision as covering" such misconduct.[4]

This broad statutory construction is even more expansive than the formulation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits sex discrimination in the workplace. Title VII provides, with respect to employers:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1)-(2). Title VII's focus thus is on actions taken *by* "an employer." Title IX, on the other hand, was drafted, as this Court has recognized, "with an unmistakable focus on the benefited class, . . . [not] simply as a ban on discriminatory conduct by recipients of federal funds." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Thus, Title IX's emphasis is on protecting individuals from discrimination, rather than on proscribing specific discriminatory practices by educational institutions.[5]

By its actions and its failures to act, the Board in the instant case violated the plain language of Title IX because it

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[4] *North Haven*, 456 U.S. at 521.

[5] Moreover, it should be noted that under Title VII, even with its focus on proscribing particular employer practices, employers can be liable for sexual harassment, even when perpetrated by third parties—including co-workers and non-agents who are in an analogous position to student peers in the Title IX context. *See, e.g., Oncale v. Sundowner Offshore Serv.*, 118 S. Ct. 998 (1998) (applying the proscription against a hostile environment to one created by co-workers along with supervisors); *see also Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2289 (1998) (noting that Courts of appeals and district courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard".) 29 C.F.R. § 1604.11(d), (e) (EEOC Guideline stating that employers are responsible under Title VII for sexual harassment by co-workers and non-employees if the employer knew or should have known of the harassment, but failed to take prompt and appropriate remedial action).

allowed sexual harassment targeting LaShonda to persist. In so doing, it unquestionably "denied [her] the benefits of" and "subjected [her] to discrimination under" its education program. Moreover, the facts in this case point to an especially active role on the part of the school in fostering the sexual harassment and the resulting hostile environment suffered by LaShonda. Not only did school officials have actual knowledge of the harassment and exhibit deliberate indifference in refusing to address or remedy it, but also actually required LaShonda to sit next to the harasser, and prevented her and other students from complaining to the principal. Pet. App. at 96a-97a. Even the principal refused to take appropriate measures in response to the complaints of LaShonda and her mother, asking LaShonda why *she* was the only one complaining. *Id.* at 97a. The unmistakable message the school's conduct sent to LaShonda and to other students was that sexual harassment would go unpunished and undeterred. These actions, as well as the failures to act, were a direct cause of the hostile environment and the discrimination to which LaShonda was subjected, and form more than a sufficient basis for holding the Board responsible under Title IX.

2. Title IX's Legislative History Demonstrates Congress' Intent to Cover Peer Harassment.

Title IX's legislative history demonstrates that its statutory protection is broad, encompassing student-to-student harassment. As chief sponsor Senator Birch Bayh noted, Title IX's role is to "provide for the women of America something that is rightfully theirs – an equal chance to attend schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they

will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972).[6] This goal is thwarted if discrimination is allowed to persist in the classroom solely because the initial perpetrator of the sexual harassment is a fellow student.

Congress enacted Title IX following an effort to amend Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, to include "sex" as a protected class. As part of this effort, Congress heard a plethora of testimony concerning barriers facing women and girls in education. For example, witnesses detailed the ways in which full access to educational opportunities was denied female students, including by fellow students:

> The institutional nature of sex discrimination in law schools also manifests itself in widespread attitudes toward women, which ultimately affect women adversely . . . For instance, when the students on law journals are mostly men . . .they usually pick male editors. This results . . . from the societal tendency to underrate the work of women. For instance, studies by psychologists have shown that students will consistently rate editors higher if told the authors are male, while the identical essays when attributed to female authorship are rated lower. This tendency to underrate has an obvious application to the case where a student choice of editors for the law journal is partly based on an evaluation of the quality of the other student's written work.

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6 The remarks of Senator Bayh, chief sponsor of Title IX, "are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 527.

Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor, 91st Cong., pt. 1, at 589 (1970) (statement of Mrs. Diane Blank and Mrs. Susan D. Ross, Women's Rights Comm. of New York Univ. L. Sch.).

In order to ensure that female students no longer would be subjected to sex discrimination in education, and thus provide "women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women," 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh), Congress enacted Title IX. The lawmakers envisioned and expected that Title IX would be both "strong and comprehensive." *Id.*[7]

In this connection, Congress broadly and purposefully proscribed "discrimination," in order to accomplish its objective of "providing individual citizens effective protection against [discriminatory] practices." *Cannon*, 441 U.S. at 704. Through such language, Congress intended that Title IX end the "corrosive and unjustified discrimination against women [by] reach[ing] into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."

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[7] It is hardly surprising that specific examples of peer sexual harassment were not mentioned in the legislative history, since sexual harassment itself was not recognized as a form of sex discrimination at that time. The first case to recognize this form of sex discrimination was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (interpreting Title VII). This Court did not address sexual harassment in the education context until 20 years after Title IX's enactment. *See Franklin*, 503 U.S. at 76 (establishing that school districts can be held liable under Title IX in cases involving a teacher's sexual harassment of a student).

118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). Congress' stated goal was to provide, without limitation, "equal access for women and men students to the educational process and the extracurricular activities in a school." 117 Cong. Rec. 30,407 (1971) (remarks of Sen. Bayh). "The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IX, Section 504, and the ADA—be given the broadest interpretation." S. Rep. No. 100-64, at 7 (1987).

Congress reaffirmed its goals regarding Title IX after the statute's implementing regulations were promulgated in 1975.[8] Specifically, Congress reviewed and ultimately approved the Title IX regulations, which include provisions that hold recipients responsible for benefits denied, or exclusion from participation, or for discrimination that occurs "under" their education programs and activities, even when the causative acts were committed by someone other than the recipient. *See North Haven*, 456 U.S. at 531-34 (relying on Congress' review and approval of employment regulations to hold that employment was intended to be covered by Title IX). In fact, the regulations contain a myriad of examples of discrimination by third parties for which recipients are held responsible.[9] Similarly, the

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[8] The former Department of Health, Education and Welfare ("HEW") promulgated the regulations initially in 1975. HEW's functions under Title IX were transferred in 1979 to the Department of Education (" DOE"), which subsequently adopted the regulations without substantive changes. *See North Haven*, 456 U.S. at 515-17 & nn.4 & 5.

[9] *See, e.g.*, 34 C.F.R. § 106.31(d) (prohibiting sex discrimination in programs not operated by recipients); *id.* § 106.31(d)(2)(i) (requiring recipient to "develop and implement a procedure designed to assure" itself that an education program not operated by recipient does not discriminate against student or employee participants).

regulations also impose liability on recipients for significantly assisting any agency, organization or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees. 34 C.F.R. § 106.31(b)(6).[10]

In the House of Representatives, after HEW published its final Title IX regulations, *see* 40 Fed. Reg. 24,128 (1975), the Subcommittee on Postsecondary Education of the House Committee on Education and Labor held hearings to determine whether HEW's regulations were consistent with Title IX and its legislative history. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong. 1 (1975) [hereinafter *1975 Hearings*]. Witnesses testified regarding many of the aforementioned regulatory provisions, thus making Congress aware of HEW's interpretation of the statute and providing lawmakers with an opportunity to eliminate or alter these provisions from the final regulations. *See 1975 Hearings*, 212 (statement of Lillian Hatcher, Int'l Representative, UAW Women's Dep't regarding § 106.51(a)(3), prohibiting recipients from entering into any contractual or other relationship that directly or indirectly discriminates on the

[10] *See also id.* § 106.32(c) (requiring recipients that work with outside agencies to provide student housing to take reasonable action to ensure that such opportunities are provided in a non-discriminatory manner); *id.* § 106.37(a)(2) (prohibiting recipients from assisting any entity that provides financial assistance to its students in a manner that discriminates on the basis of sex); *id.* § 106.38(a) (prohibiting recipients from assisting any entity that discriminates on the basis of sex in making employment available to students); *id.* § 106.51(a)(3) (prohibiting recipients from entering into any contractual or other relationship that directly or indirectly discriminates on the basis of sex in employment in education).

basis of sex in education,); *id.* at 250, 252 (prepared statement of Am. Assoc. of Presidents of Indep. Colleges and Univs. (AAPICU) regarding §§ 106.32, 106.31 (d), and 106.37, respectively, which prohibit various forms of discrimination not perpetrated by recipients themselves); *id.* at 397 (statement of Dr. Bernice Sandler, Director, Project on the Status and Educ. of Women regarding § 106.31(b)(6), which prohibits recipients from "providing significant assistance" to any entity that discriminates based on sex).

Several members of Congress introduced resolutions or bills to disapprove of the 1975 regulations governing relationships between recipients of federal funding and third parties. Senator Helms introduced Senate Concurrent Resolution 46, which was identical to House Concurrent Resolution 310, which criticized the regulations governing housing, *see* 34 C.F.R. § 106.32, the regulations that prohibited recipients of funds from granting "significant assistance" to another person or entity that discriminated on the basis of sex, *see* 34 C.F.R. § 106.37(a)(2), and the regulations that govern employment assistance to students provided by non-recipients, *see* 34 C.F.R. § 106.38(a). *See* 121 Cong. Rec. 21,510-16 (1975). On the subject of prohibiting recipients of federal funds from providing "significant assistance" to another person or entity that discriminates, Senator Helms stated, "There is no basis for believing that Congress intended by the enactment of Title IX that the meaning of this term ["receiving" financial assistance] should be extended so as to indirectly encompass remote benefits to some program or activity separate from the educational program or activity to which the Federal financial assistance is given." *See* 121 Cong. Rec. 21,510 (1975) (Memorandum in support of Concurrent Resolution by Sen. Helms). Despite these concerns, Congress did not

restrict the scope of the regulations and they went into effect. *See North Haven*, 456 U.S. at 533 n.24; 121 Cong. Rec. 23,846 (1975).

After the final Title IX regulations went into effect, an amendment was offered to limit their scope in holding institutions liable for failure to remedy discrimination by third parties and non-agents of the institution. 122 Cong. Rec. 28,134 (1976) (Debate on the Education Amendments of 1976, Amendment proposed by Sen. McClure). This amendment attempted to limit severely Title IX's mandate against sex discrimination by defining "education program or activity" as "such programs or activities as curriculum or graduation requirements of the institutions." 122 Cong. Rec. at 28,136. Testimony in the debate cautioned against the broad application of Title IX to encompass discrimination not perpetrated directly *by* recipients. (Ex. A, Testimony by Dallin H. Oaks, president of Brigham Young University and a director and secretary of the AAPICU). Congress received testimony specifically criticizing the "unfairness" of requiring institutions to remedy discrimination carried out by "organizations outside their control," such as student teacher placements, housing providers and companies recruiting students for employment. 122 Cong. Rec. at 28,142. Congress rejected these proposals to limit the scope of Title IX, further indicating its intent to ensure that institutions address and remedy discriminatory acts occurring "under" their education programs or activities—whether carried out by employees, third-parties, or other non-agents. 122 Cong. Rec. at 28,148.

Congress subsequently has reaffirmed its intention to prohibit sex discrimination occurring "under" federally funded educational programs and has refused to adopt

provisions that would scale back the statute's scope and thus subvert its broad coverage.[11] For example, in response to restrictive interpretations of Title IX and similar statutes,[12] Congress enacted the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, which abrogated the Eleventh Amendment immunity of the States from suit under Title IX. The 1986 statute strongly supports Congress' intent to ensure Title IX's broad application. Two years later, Congress enacted the Civil Rights Restoration Act, 20 U.S.C. § 1687, overruling the Supreme Court's decision that Title IX's proscription against sex discrimination was limited to the particular program receiving federal funds. *See Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984). In this context, members of Congress repeatedly stated that Title IX was intended to require institutions to ensure that sex discrimination was not a part of any of their programs or activities. This view was informed by testimony that again highlighted the critical need to assure that recipients address the sex discrimination occurring "under" or in their programs or activities. Congress was aware of and intended to cover instances in which educational institutions turned their backs on sex discrimination targeting students—including those in which the initial discriminatory acts came from fellow students. One educator testified:

> When the first six young women enrolled at Gompers [Vocational Technical High School] in 1977, the principal at that time sent them home that first day of

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[11] As *Cannon* recognized, this Court would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within the civil rights enforcement scheme." *Cannon*, 441 U.S. 686-87 n.7.

[12] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

> school with the admonition: "You'd better transfer to another school. *I can't guarantee your safety here.*" I was appointed to admissions and engaged in a recruiting drive for young girls . . . It was a struggle to retain them.

Joint Hearings before the Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 700 (The Civil Rights Restoration Act of 1985) 98th Cong. 27 (statement of Hilda Gore, Dir. of Admissions, Samuel Gompers Vocational Technical High School) (1985) (emphasis added) [hereinafter *CRRA Hearings*]. Congress heard other examples of student-to-student harassment, as well:

> [T]he effort to remove sex discrimination from schools must continue because implementation and enforcement of the law has been, at best, sporadic. . . .[F]emale students enrolled in traditionally male schools report that they feel unwelcome and uncomfortable in traditionally male schools. Consider the following recent statements by female students:
>
> > After four years in the school, if a teacher asks me to go on an errand to a classroom in the basement, I never go alone. When I first came here, I was so frightened in the hallways that I always walked with my head down. I was constantly getting lost and arriving late to class.

As one female student said: "The boys try to run you

> over until you get so tired you don't even want to come to school anymore.". . . There is still an urgent need for the Federal government to prohibit sex discrimination in schools.

CRRA Hearings, 93-94 (Statement of Rhoda Schulzinger, Staff Dir., Full Access Rights to Education). In light of these concerns that recipients address sex discrimination occurring under their programs, members of Congress recognized that "[t]he comprehensive impact of Title IX must be restored in education." 130 Cong. Rec. 9632 (1984) (remarks of Rep. Johnson).

The repeated, consistent expressions of Congress' intent that Title IX provide broad protection make clear that Title IX's scope encompasses, and was intended to encompass, student-to-student sexual harassment. To adopt the Eleventh Circuit's blanket rule, which plainly contradicts Title IX's language and legislative history, would mean that educational institutions could ignore the most egregious sexual assaults by students against students or allow male students to intimidate and harass female students until they dropped out of a physics or computer technology course, for example, and not be found in violation of Title IX. Such a result cannot be squared with the strong language and clear direction of the statute's legislative history.

B. The Decision Below Ignores this Court's Precedents Which Support Title IX Coverage of Student-to-Student Sexual Harassment.

Despite Title IX's broad language and legislative

history supporting the breadth of its terms, as well as this Court's interpretations of it, the Eleventh Circuit, joined by the Fifth Circuit, has concluded that Title IX's general prohibition against sex discrimination does not apply to an institution's failure to remedy or address student-to-student sexual harassment. These courts rely on their misinterpretations of the Spending Clause, and their mistaken assumptions about the application of agency principles to reach this conclusion.

The Eleventh Circuit foreclosed any Title IX coverage, and therefore any jurisdiction either for federal agency enforcement or private actions against educational institutions, based on its conclusion that recipients lacked the requisite notice under the Spending Clause that they could be liable for this form of sex discrimination. *Davis*, 120 F.3d at 1401. Agreeing with this general proposition, the Fifth Circuit allowed that schools might face liability, but only if they responded to complaints of female students differently than those of male students. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996). These decisions ignore this Court's precedents, in which the Spending Clause never has precluded coverage of sexual harassment under Title IX.

Both courts also distinguish teacher-to-student harassment, which this Court has found was covered by Title IX, from peer harassment, based on their assumption that school liability for teacher-student harassment is premised on the teacher's agency relationship with the school. *Davis*, 120 F.3d at 1401; *Rowinsky*, 80 F.3d at 1011. However, this Court has made clear that Title IX's obligation to ensure that individuals are neither "denied the benefits of," "excluded from participation in," or "subjected to discrimination under" federally funded education programs or activities is not based

on or restricted by agency principles. As this Court has recognized, sexual harassment can be a violation of Title IX, regardless of whether the perpetrator is an agent of the institution.

1. *Gebser* and *Franklin* Make Clear that the Spending Clause is No Bar to Title IX Coverage of Student-to-Student Sexual Harassment.

Both *Davis* and *Rowinsky* draw the unfounded conclusion that Title IX does not apply to peer sexual harassment cases, based on their erroneous view of limitations emanating from the Spending Clause.[13] In this regard, the Eleventh Circuit opined, Title IX must "read like a prospectus and give funding recipients a clear signal of what they are buying." *Davis*, 120 F.3d at 1399. According to the Eleventh Circuit, because there is no explicit statutory language or legislative history addressing peer sexual

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[13] In fact, while the Spending Clause authority fully supports Title IX coverage of peer harassment, Title IX also was enacted pursuant to Section 5 of the Fourteenth Amendment. *See Cannon*, 441 U.S. at 688 n.7, 704 (recounting Title IX's purposes and legislative history); *Doe v. University of Illinois*, 138 F.3d 653, 660 (7th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3083 (July 13, 1998) ("[P]rohibiting arbitrary, discriminatory conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment") (internal citations omitted); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); 118 Cong. Rec. 5982 (1972) (referring to Fourteenth Amendment as authority for Title IX); 131 Cong. Rec. 22,346 (1985) (invoking Fourteenth Amendment as authority for legislation to abrogate state immunity in actions under Title IX and related statutes); 132 Cong. Rec. 28,624 (1986) (same); *see also Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) (legislation may have more than one source of congressional power). However, as in *Franklin*, this Court need not decide all of Title IX's sources of authority to decide this case. *Franklin*, 503 U.S. at 75 n.8.

harassment *per se*, that clear signal is missing. Under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981),[14] the Eleventh Circuit asserted statutes authorized by the Spending Clause must provide such explicit signals to provide adequate notice for recipients of federal funds.

That logic flies in the face of this Court's decisions in *Gebser* and *Franklin*. Both of these cases hold that Title IX covers a teacher's sexual harassment of a student despite the absence of specific language identifying such conduct in the statute's text and legislative history.[15] *Gebser*, like *Franklin*,

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[14]At issue in *Pennhurst* was a provision of the Developmentally Disabled Assistance and Bill of Rights Act ("DDA"), 42 U.S.C. § 6001 *et seq.*: namely, a "bill of rights" that made specific findings regarding the rights of persons with disabilities. The Court held that this provision did not create any enforceable rights, based largely on the fact that it placed no clear obligations on states. *See Pennhurst*, 451 U.S. at 23. The Court concluded that this provision was "simply a general statement of findings and, as such, . . . too thin a reed to support the rights and obligations read into it by the court below." *Id.* at 19. In contrast, as discussed at length, *supra*, Title IX clearly requires federally funded institutions to ensure that individuals are not denied the benefits of, excluded from participation in, or subject to discrimination under their education programs or activities. *See* 20 U.S.C. § 1681(a).

[15] Even before *Gebser*, this Court had clarified that the "contractual nature" of Spending Clause statutes does not require a detailed list of every cause of action that may arise. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). In that case, the State of Kentucky challenged the Department of Education's efforts to obtain repayment of funds granted pursuant to Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27, 20 U.S.C. § 2701 *et seq.* The State argued that because Title I's requirements were ambiguous, it lacked the requisite notice that it could be held responsible for allegedly violating mandated assurances that Title I funds would not be used to supplant state and local monies designated for education programs. The Court rejected this argument, finding that the requirement was not ambiguous and explaining the nature of the contractual

clearly encompasses a cause of action for teacher-to-student sexual harassment; doing so was a necessary predicate for determining the standard for damages in such cases.[16] Thus,

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relationship contemplated by the Spending Clause:

> Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy. Title I, for example, involved multiple levels of government in a cooperative effort to use federal funds to support compensatory education for disadvantaged children. The Federal Government established general guidelines for the allocation and use of funds, and the States agreed to follow those guidelines in approving and monitoring specific projects developed and operated at the local level. Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I.

Id. at 669. Title IX similarly represents Congress' effort to use federal funds to support the goal of eliminating sex discrimination in education. The statute's broad directive, its emphasis on protecting individuals, and Congress' stated objectives of ensuring that persons not be "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" education programs, demonstrate that Congress specifically intended *not* to limit the scope of Title IX by articulating specifically each and every cause of action prohibited.

[16] In its effort to circumscribe the scope of Title IX, the Eleventh Circuit further suggests that teacher-to-student harassment may not be cognizable under the statute. *See Davis*, 120 F.3d at 1400 n.14 ("The Supreme Court's suggestion that teacher-student sexual harassment gives rise to a cause of action under Title IX was arguably dicta."). However, as this Court noted, "Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action." *Franklin*, 503 U.S. at 74. Thus, the fact that Title IX recognizes a cause of action for teacher-to-student harassment was integral to this Court's holding that all appropriate remedies are available under Title IX.

because the Spending Clause was not a bar to recognizing the availability of damages, it clearly did not preclude recognizing the underlying cause of action. In *Franklin*, the Court specifically rejected the argument that money damages should not be available under Title IX because of the limitations imposed on Spending Clause legislation, holding that all appropriate relief, including damages, is available under Title IX.

As *Gebser* and *Franklin* make clear, Title IX's general prohibition of gender-based discrimination under a Title IX recipient's program is fully sufficient for Spending Clause purposes. In addition, given the fact that the basis for liability in such cases, as described below, is the recipient's failure to address the harassment—that is, its failure to ensure that individuals are not denied the benefits of, excluded from participation in, or subjected to discrimination under its education program—these decisions further support coverage of student-to-student harassment under Title IX.

2. *Gebser* Makes Clear that Educational Institutions May be Held Liable under Title IX for Their Own Response to Sexually Hostile Environments, Whether Created by Teachers or Students.

The Eleventh Circuit erroneously concluded that teacher-to-student harassment is distinguishable from peer harassment because teachers are agents of the school, while students are not. *Davis*, 120 F.3d at 1401; *see also Rowinsky*, 80 F.3d at 1012-13. However, as this Court's decision in *Gebser* makes plain, institutional liability for sexual harassment under Title IX is not limited to actions arising from agents alone.

Gebser holds that educational institutions may be subject to damages liability for failing to remedy teacher-to-student sexual harassment when a school official "with authority to take corrective action to end the discrimination" knew of the harassment and responded to it with deliberate indifference. *Gebser*, 118 S. Ct. at 1999. In articulating this standard, the Court considered and rejected the use of agency principles to hold a recipient liable in damages for the conduct of the harasser—the very standard used by the Eleventh and Fifth Circuits to distinguish peer harassment from teacher-student claims. *Compare Davis*, 120 F.3d at 1401 ("The present complaint . . . does not allege that a school employee discriminated against LaShonda . . . . The complaint alleges that [school officials] failed to take measures sufficient to prevent a non-employee from discriminating against LaShonda."), *with Gebser*, 118 S. Ct. at 1996 ("Title IX contains no . . . reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.") The Court held that liability for damages was based on the educational institution's official decision not to remedy the discrimination, rather than on the identity or agency relationship (if any) of the harasser to the school.

That the Court in *Gebser* did not rely upon an agency relationship as necessary for the recovery of damages, in light of the Court's concern that schools not be subjected to unlimited financial liability, is particularly telling. Under *Gebser*, damages are available under circumstances that are narrower than those leading to Title IX coverage for agency enforcement or for equitable relief. For example, *Gebser* left unaltered the Department of Education's ("DOE") standards for enforcing Title IX's proscription against sexual harassment, even though they are less stringent than those

required for damages.[17] Under DOE standards, educational institutions are liable if they knew or should have known of peer hostile environment sexual harassment, but failed to take prompt, remedial action. *See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,042 (Mar. 13, 1997) [hereinafter *Sexual Harassment Guidance*].[18]

Further, *Gebser* repeatedly articulates the differences between damages and equitable relief in private actions or agency enforcement proceedings. For example, in analyzing the question of the damages standard before it, this Court stated that petitioners "sought not to establish a Title IX violation but also to recover damages". 118 S. Ct. at 1996. In explaining why damages could be considered separately from other remedies, the Court noted that when Title IX was enacted in 1972, Title VII only allowed injunctive and equitable relief, not monetary damages. *Id.* at 1997. The

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[17] Indeed, the defendant school district in *Gebser* conceded that injuctive relief may be available under Title IX even when damages are not:

> [T]he district could certainly be held "responsible" in the sense that it could be ordered to remedy the situation by firing the offending teacher, adopting new policies, enforcing existing policies, or taking other appropriate remedial action.

Brief for Respondent Lago Vista at 13, *Gebser*, 118 S. Ct. 1989 (No. 96-1866).

[18] Following the *Gebser* decision, the DOE sent a letter of clarification to school superintendents nationwide, stating that "the obligations of schools that receive federal funds to address instances of sexual harassment have not changed as a result of the Supreme Court decision." Letter from Richard W. Riley, Secretary of Educ., Aug. 28, 1998 (Attached as App. A).

Court expressed concern that an award of damages in a particular action, in contrast to other remedies, could exceed the amount of federal funds received by the school. *Id.* at 1999.

Accordingly, given the Court's concerns about damages remedies, the fact that agency principles did not form a predicate for damages demonstrates that an agency relationship between the harasser and the school can hardly be a predicate for a violation of Title IX and for the imposition of non-damages relief. Thus, when a recipient turns its back on sexual harassment—whether by a teacher or a student—and allows an individual to be "subjected to" discrimination or otherwise "excluded from participation" in its programs because of the misconduct, the institution must be held liable for a violation of Title IX.

This conclusion is only underscored by the Court's Title VII precedents, the principles of which may apply in determining whether sexual harassment is sex discrimination under Title IX. *Gebser*, 118 S. Ct. at 1995. Even under Title VII's statutory scheme, which is more focused on the specific actions of the employer, in contrast to Title IX's focus on the elimination of discrimination from whatever its source, the identity of the harasser is not the touchstone for determining whether such discrimination has occurred. Rather, the appropriate inquiry, as this Court has clarified time and again, focuses on the nature of the conduct and the response of the entity—whether the harasser is a peer or a supervisor. *See, e.g., Oncale*, 118 S. Ct. at 1001 (noting in a peer and supervisor harassment context that "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated") (citation and

internal quotation marks omitted).

Under the plain language of the statute, and this Court's interpretation of it, such misconduct clearly violates Title IX. There simply is no principled basis for the Fifth and Eleventh Circuit's conclusion that Title IX requires educational institutions to address sexual harassment of a student by a teacher, but not by another student. Accordingly, because, in the instant case, the Board violated its obligation not to "subject" LaShonda to discrimination or "deny" her the benefits of the education it provided when it refused to remedy repeated instances of discrimination, Mrs. Davis has stated a claim under Title IX.

II. THE DEPARTMENT OF EDUCATION RECOGNIZES THAT STUDENT-TO-STUDENT SEXUAL HARASSMENT IS COVERED UNDER TITLE IX.

The Department of Education consistently has required recipients to remedy sex discrimination emanating from third parties, including students, in their programs. This interpretation of the statute, as reflected in DOE's regulations, discussed *supra* in Section I.A.2, policy statements, and enforcement actions is consistent with the broad language of Title IX and Congress' intent; therefore, it is entitled to great deference. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *North Haven*, 456 U.S. at 522 n.12.

A. The Department of Education's Policy Guidance Covers Peer Hostile Environment Sexual Harassment.

The Department of Education's Office for Civil Rights (OCR) consistently has imposed an obligation on

recipients to take appropriate action to remedy discriminatory harassment, including sexual harassment of which they knew or should have known. OCR has issued extensive policy guidance on sexual harassment in general, reflecting OCR's interpretations that have been in place for many years. *See Sexual Harassment Guidance*. The Sexual Harassment Guidance specifically addresses student-to-student harassment and "reflects longstanding OCR policy and practice" that sexual harassment of students by other students violates Title IX. 62 Fed. Reg. at 12,035. As OCR explains, this "policy and practice is consistent with Congress' goal in enacting Title IX—the elimination of sex-based discrimination in federally assisted education programs." *Id.* at 12,034.

According to the Sexual Harassment Guidance, a school may be found in violation of Title IX for peer sexual harassment if: "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action." *Id.* at 12,039.[19] A recipient's failure to respond to known sexual harassment "permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX." *Id.* Accordingly, the Department finds recipients in violation of the statute in such instances because they have failed to

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[19] Actual notice occurs when "an agent or responsible employee" receives notice. 62 Fed. Reg. at 12,042 . The Preamble to the Guidance cautions that providing a list of personnel to whom notice could be given would be "inappropriate" as it will depend on a variety of factors, including "the authority actually given to the employee and the age of the student." *Id.* at 12,036-37. Constructive notice occurs when the harassment is "widespread, openly practiced, or well-known to students and staff." *Id.* at 12,042.

fulfill their obligation under Title IX to ensure that students are not subjected to sex discrimination. A recipient fulfills this obligation when it acts "immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence." *Id.* at 12,037. OCR's policy stating that an institution may be out of compliance with Title IX for failure to remedy peer sexual harassment is consistent with Title IX's mandate and Congress' intent and with its enforcement actions.

B. The Department's Enforcement Actions Have Long Required Recipients to Remedy Sexually Hostile Environments Created by Students.

OCR's enforcement actions under Title IX consistently have imposed liability on recipients that fail to take appropriate action to end peer sexual harassment of which they knew or should have known. *See, e.g.*, Letter of Findings by Kenneth A. Mines, Reg'l Civil Rights Dir., Region V (Apr. 23, 1993), Docket No. 05-92-1174; Letter of Findings by John E. Palomino, Reg'l Civil Rights Dir., Region IV (July 24, 1992), Docket No. 09-92-6002; Letter of Findings by John E. Palomino, Regional Civil Rights Dir., Region IX (May 5, 1989), Docket No. 09-89-1050 (Attached as App. B).

These Letters of Finding are entitled to deference from the Court because they are consistent with Title IX and its legislative history and thus represent well-established practice by the agency charged with enforcing Title IX. *Smiley v. Citibank*, 517 U.S. 735, 740 (1996); *Georgia Dep't of Med. Assistance v. Shalala*, 8 F.3d 1565, 1567 n.8 (11th Cir. 1993) (citing *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992)); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1291 n.3 (N.D. Cal. 1993) (citing OCR Letters of Findings); *see also Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (citing OCR Letter of Finding in Title IX athletics case); *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1009-10 & n.9 (E.D. Mich. 1991) (deferring to OCR rulings interpreting Title IX to prohibit all-male public elementary and secondary school programs).

As an established practice that is grounded firmly in Title IX's language, its legislative history, and relevant Supreme Court precedent, DOE's interpretation that Title IX covers peer harassment is entitled to substantial deference.

C. The Department's Interpretation of Title VI Further Supports Its Application of Title IX to Peer Sexual Harassment.

Because of the similarities of Title IX and Title VI, as well as their respective enforcement schemes, Title VI provides useful guidance in determining the scope of Title IX in reaching peer sexual harassment. *See Cannon*, 441 U.S. at 694-95 (stating that "Title IX was patterned after Title VI of the Civil Rights Act of 1964" and that the "two statutes use identical language to describe the benefited class"); *id.* at 688 n.7 (stating that both statutes form a significant "'part of the civil rights enforcement scheme'" that Congress has enacted pursuant to its "'obligation to enforce the 14th amendment by eliminating entirely . . . discrimination'") (quoting 122 Cong. Rec. 31,372 (1976) (remarks of Sen. Kennedy)). Consistent with its view of Title IX, the Department has interpreted Title VI to require recipients to take corrective action once they have notice of a racially hostile environment created by students.

Like the Title IX regulations, Title VI's regulatory prohibition of discrimination on the basis of race, color, or national origin extends to discrimination that occurs under the recipient's program even if it is not perpetrated by the recipient in the first instance. *See* 34 C.F.R. § 100.3(c) (concerning discrimination resulting from contractual arrangements); *see also id.* at Pt. 100, App. B(IV), (VI), & (VII) (guidelines to the regulations requiring recipients to ensure that students enrolled in job placement programs are not subjected to discrimination on the basis of race, color, or national origin and to obtain written assurances that sponsors will not discriminate).

Consistent with its broad regulatory authority, the Department of Education announced in 1994 that it would hold educational institutions responsible under Title VI for failing to remedy hostile environment racial harassment caused by students. In its 1994 Investigative Guidance, the Department stated that "[a] recipient [of federal funds] has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice." *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449 (1994) [hereinafter *Title VI Investigative Guidance*]. This obligation encompasses peer racial harassment. As the Investigative Guidance explains, the "alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment." *See id.*

In a recent opinion, the Ninth Circuit applied this Investigative Guidance to uphold allegations of peer racial

harassment as sufficient to state a cause of action under Title VI. *See Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 WL 727338, at *10 (9th Cir. Oct. 19, 1998). In this case, the plaintiff, the mother of an African-American student, claimed that white students had called her daughter and other black students "nigger," verbally and through graffiti, and that even after the students and their parents complained, school authorities did nothing to address the white students' behavior. *See id.*

The court had no difficulty recognizing why such conduct violated the statute's non-discrimination mandate:

> [B]eing referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts.

Id. This recognition is equally appropriate where the harmful conduct targets a student because of her sex and school officials refuse to address it.[20]

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[20] Section 504 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 794), has been held to prohibit hostile environment discrimination based on disability. This prohibition encompasses instances where a non-agent or third-party carries out the harassment, and the recipient knew or should have known of the harassment, but failed to take remedial steps. *See, e.g., Kent v. Derwinski*, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991) (employer in violation of § 504 where Veterans Administration's efforts to remedy "taunting and ridicule" of mentally retarded employee by co-workers

In finding that the plaintiff could state a claim under Title VI, the Ninth Circuit considered the three-part test stated in the Investigative Guidance in determining a violation, and then applied this Court's decision in *Gebser* to conclude that a damages remedy would lie for such a violation. The Investigative Guidance requires the following showing to establish a Title VI violation: (1) the existence of a hostile racial environment, defined as one in which "severe, pervasive or persistent" racial harassment has occurred; (2) actual or constructive notice to the recipient of federal funds; and (3) the recipient's failure to "respond adequately to redress the racially hostile environment." *See Title VI Investigative Guidance*, 59 Fed. Reg. at 11,449. By applying this test to the facts alleged by the plaintiff in *Monteiro*, the Ninth Circuit found that she could state a claim for a violation of Title VI. *See Monteiro*, 1998 WL 727338, at *11. The court then used the *Gebser* test to state that a school district could be liable for damages under Title VI if it was "'deliberately indifferent'" to its students' right to a learning environment free of racial hostility and discrimination." *See id.* (quoting *Gebser*, 118 S.Ct. at 1999).

This Court has recognized that Title VI was enacted because of Congress' concern "with the lack of progress in school desegregation." *Green v. County Sch. Bd.*, 391 U.S. 430, 435 n.2 (1968). Shortly after the enactment of Title VI in 1964, courts handled a range of issues relating to the progress of desegregation, including peer racial harassment.

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were untimely and inadequate, resulting in constructive discharge); *see also Taylor v. Garrett*, 820 F. Supp. 933, 940 n.11 ("[I]t is strongly arguable . . . that disability-based harassment responsible for creating an abusive working environment is itself actionable under the Rehabilitation Act.") (citing *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 958 F.2d 372 (6th Cir. 1992) (table)).

Recognizing that school officials must take steps to prevent student-to-student racial harassment in order to actualize desegregation, the Fifth Circuit entered a model desegregation decree which provided in relevant part:

> Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior.

United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 392 (5th Cir. 1967); *see also Stell v. Board of Pub. Educ.*, 387 F.2d 486, 495 (5th Cir. 1967) (same); *Coppedge v. Franklin County Bd. of Educ.*, 273 F. Supp. 289, 299 (E.D.N.C. 1967), *aff'd*, 394 F.2d 410 (4th Cir. 1968). (same); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.) (same), *aff'd sub nom. Wallace v. United States*, 389, U.S. 215 (1967).

In *Moses v. Washington Parish School Board*, 302 F.Supp. 362 (E.D. La 1969), the court very specifically focused on the school's responsibility for destructive student behavior:

> In accordance with the Order of this court of October 19, 1967, all appropriate measures shall be promptly and firmly taken at all times to discourage, suppress, discipline, and otherwise punish physical abuses, retaliation, harassment, name-calling, and similar treatment of pupils of either race by pupils of another race on a racial basis.

Id. at 367. *See also Bowman v. County Sch. Bd.*, 382 F.2d 326 (4th Cir. 1967) (Sobeloff, J., concurring) ("In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools.") (quoting U.S. Comm'n on Civil Rights, *Survey of School Desegregation in the Southern and Border States,* 1965-66, at 51 (1966)).

The fact that in the wake of Title VI peer harassment was addressed in desegregation orders, and that this was so before Title IX was passed, strongly militates in favor of recognizing this cause of action under Title IX, particularly since Congress explicitly modeled the statute on Title VI. *See Cannon*, 441 U.S. at 695.

III. PETITIONER HAS STATED A CLAIM FOR RELIEF UNDER TITLE IX.

Petitioner Davis has stated a claim for damages and equitable relief under Title IX. With respect to her damages claim, as discussed above, this Court held in *Gebser* that damages are available for sexual harassment when a school official with authority to institute corrective measures had actual knowledge of the harassment and responded to it with "deliberate indifference." *Gebser,* 118 S. Ct. at 1999-2000. The facts of the instant case easily fit into the framework established in *Gebser* for recovery of damages.

First, there is no doubt that a school official with authority to institute corrective action had actual notice of the sexual harassment. As discussed *supra*, over a period of five months, LaShonda and Mrs. Davis provided notice of the sexual harassment to persons with the authority to act on behalf of the Board with respect to G.F.'s conduct. Pet. App. at 96a-97a. Specifically, after each instance of sexual

harassment LaShonda, Mrs. Davis, or both complained to the appropriate teachers. *Id.* By May 1993, after no response was forthcoming from the school, Mrs. Davis directly contacted Prinicipal Querry, who, according to classroom teacher Mrs. Fort had been notified five months earlier. *Id.* Thus, there is no question that Respondents had actual notice of the sexual harassment.

Second, the Board responded with deliberate indifference to the sexual harassment. Under this standard, Petitioner must show that a "municipal actor disregarded a known or obvious consequence of his action." *Board of Comm'rs v. Brown*, 117 S. Ct. 1382, 1391 (1997); *Canton v. Harris*, 489 U.S. 378, 388 (1989).[21] In applying this standard to a Title VI case involving student-to-student racial harassment, the Ninth Circuit recently found that a school board is "liable for its failure to act if the need for intervention was so obvious, or if inaction was so likely to result in discrimination, that 'it can be said to have been

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[21] In *Board of Commissioners v. Brown*, which involved a § 1983 claim based on a sheriff's decision to hire a deputy who used excessive force, the Court found:

> Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federal right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

117 S. Ct. at 1385. In the instant case, had "adequate scrutiny" been accorded the repeated complaints by LaShonda and her mother, a "reasonable" school official would have concluded that a consequence of ignoring the harassment would be the deprivation of LaShonda's right to not be "subjected to discrimination under" the education program provided by the Board.

deliberately indifferent to the need.'" *Monteiro*, 1998 WL 727338, at *11 (holding that a cause of action for peer racial harassment exists under Title VI and quoting *Canton*, 489 U.S. at 388-92).

In the instant case, the need for intervention by school officials was obvious, yet the officials failed to exercise their authority to address the harassment. Despite the fact that LaShonda and her mother complained about G.F.'s five-month campaign of pervasive harassment targeting LaShonda, and repeatedly sought assistance from school officials, their pleas for help were ignored or thwarted. For example, Mrs. Fort refused for over three months to allow LaShonda the simple remedy of a new seating assignment away from G.F. Pet. App. at 97a. Mrs. Fort also intercepted LaShonda's attempts to speak to the principal directly by stating "[i]f he wants you, he'll call you." *Id.* at 96a. When Mrs. Davis urged Principal Querry to intervene, he responded by asking LaShonda "why she was the only one complaining." *Id.* at 97a.

This conduct permitted a sexually hostile environment to flourish, affecting LaShonda's ability to benefit from the education the Board provided, as evidenced by her declining academic performance, and harming her emotional and mental well-being, as evidenced by the suicide note she authored. *Id.* The Board's repeated refusals to act in the face of certain harm to this fifth-grade student evince its deliberate indifference to LaShonda's plight. *See Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1128 (10th Cir. 1998) (concluding that plaintiff had stated a damages claim for peer harassment under Title IX where complaint alleged actual knowledge and failure to take any remedial action on part of school officials). Indeed, the fact that school officials outright refused to remedy the situation—by requiring her to

sit next to G.F. for over three months and thwarting her attempts to complain directly to the principal—indicate that the Board's response exceeded the deliberate indifference standard.

Given the posture of this case, Mrs. Davis has more than adequately alleged sufficient facts to state a claim for damages under Title IX. Based on the lower standard for non-damages relief,[22] Mrs. Davis' claim for equitable relief [23] must also stand. Equitable relief, including an order to implement a sexual harassment policy and to refrain from discriminating against female students by failing to respond to complaints of sexual harassment, is particularly important in cases such as this one to ensure that institutions take the necessary steps to eliminate the discrimination. Otherwise, sexual harassment could continue in violation of the statute. This Court should reverse the Eleventh Circuit's decision,

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[22] *See infra* at I.B.2.

[23] Mrs. Davis' complaint prays for, *inter alia*, an order requiring respondent to implement a sexual harassment policy and enjoining the district from discriminating against female students by failing to respond to complaints of sexual harassment. Pet. App. at 102a.

remand the case, and permit the Petitioner to proceed with her cause of action.

CONCLUSION

For the foregoing reasons, Petitioner urges this Court to reverse the Eleventh Circuit's decision and remand the case.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

August 28, 1998

An important shared goal of educators throughout our country is to ensure that students have a safe and secure environment that is conducive to learning and that affords students equal educational opportunities regardless of their sex. School districts have a critical responsibility for preventing and eliminating sexual harassment discrimination. Sexual harassment of a student, if not appropriately addressed, can have serious, detrimental consequences for the student that impedes the student's education, and constitutes a breach of trust between the school and the student and family.

A recent Supreme Court decision took notice of the "extraordinary harm" that a student suffers when subjected to sexual harassment and abuse by a teacher. The Court emphasized that such conduct by a teacher "undermines the basic purposes of the educational system." Gebser v. Lago Vista Independent School District (June 22, 1998). The Gebser decision limited the availability of damages to a student in a private Title IX lawsuit against a school district. It did not, however, alter the fundamental obligations of schools and their employees to take prompt action to address instances of sexual harassment. This letter summarizes existing obligations and the effect of the Supreme Court decision.

Title IX Prohibits Sexual Harassment Discrimination

The Department of Education's Office for Civil Rights (OCR), which has the responsibility for enforcing Title IX, recently provided educational institutions with a detailed discussion of their responsibilities to prevent and, when it

occurs, remedy sexual harassment of students. A copy of the guidance is available on the Department's web site at http://www/ed.gov/offices/OCR/sexhar00.html.

Title IX prohibits sex-based discrimination in education programs and activities operated by schools that receive federal financial assistance. Therefore, school districts are responsible under Title IX to provide students with a nondiscriminatory educational environment. As described in the guidance, sexual harassment of a student may violate this obligation. When a responsible school employee, such as a principal or teacher, learns of possible sexual harassment discrimination by others, Title IX requires the school to immediately investigate, to take appropriate steps to end the harassment, to eliminate the effects of the harassment, and to prevent the harassment from recurring.

The Department's Title IX regulation also requires schools to have well-publicized policies against discrimination based on sex, including sexual harassment discrimination; to have effective and well-publicized procedures for students and their families to raise and resolve these issues; and to take prompt and effective action to equitably resolve sexual harassment discrimination complaints. 34 CFR Part 106.8. In addition, each school district is required to designate at least one employee to coordinate and carry out its Title IX responsibilities. Id. I encourage you, at the outset of the new school year, to publicize and reaffirm these policies and procedures to returning and new members of the school community, including teachers, counselors, administrators, parents, and students.

The Gebser Decision Addresses Private Damages Claims

The Court's recent decision in Gebser was limited to private Title IX lawsuits for money damages. The Court in Gebser ruled that a private plaintiff in a court action can obtain money damages against a school district under Title IX if a school official who has the authority to take corrective action has actual notice of sexual harassment and is deliberately indifferent to it. The Gebser decision expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX. Thus, the obligations of schools that receive federal funds to address instances of sexual harassment have not changed as a result of the Supreme Court decision. School districts must continue to take reasonable steps to prevent and eliminate sexual harassment discrimination. In addition, pursuant to its published guidance, OCR will continue to enforce Title IX in this area, including by investigating complaints alleging sexual harassment discrimination.

OCR Offers Technical Assistance

Sexual harassment discrimination can have serious, detrimental consequences for students. Thus, school districts need to take the problem of sexual harassment very seriously. In addition to having well-publicized policies and procedures in place, schools should be taking preventative steps to identify problems -- such as training staff to recognize and report potential harassment -- and to follow up on any information indicating potential discrimination. OCR welcomes the opportunity to provide individual schools upon request with technical assistance and practical guidance to develop preventative programs.

The Department is committed to continuing our leadership role in ensuring equal educational opportunities for all students. The Department will continue to work with schools, parents and other interested parties to ensure that schools have effective policies and procedures in place to prevent sexual harassment. I have attached a contact list for OCR's regional offices for your convenience.

Thank you for your interest in this critical issue.

Yours sincerely,

Richard W. Riley

Enclosure

APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS-REGION V
401 SOUTH STATE STREET-7TH. FLOOR
CHICAGO, ILLINOIS 60605-1202

OFFICE OF THE
DIRECTOR

APR 27, 1993

Dr. Gerald L. McCoy
Superintendent
Eden Prairie Schools, District #272
8100 School Road
Eden Prairie, Minnesota 55344-2292

Re: 05-92-1174

Dear Dr. McCoy:

The Office for Civil Rights (OCR), U.S. Department of Education, has completed its investigation of the above-referenced complaint you (hereinafter the "complainant") filed on September 23, 1992, against Eden Prairie Schools, District #272 (district). The complainant alleged that the district has failed to address adequately incidents of sexual harassment against her daughter (also referred to as student A) and other female elementary, intermediate, and middle school students on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

OCR is responsible for enforcing Title IX and its implementing regulation at 34 C.F.R. Part 106 which prohibit discrimination on the basis of sex in education programs and activities receiving Federal financial

assistance. The district receives funding from the U.S. Department of Education and is, therefore, subject to these provisions.

On the basis of evidence submitted by both the complainant and the district and testimony provided by witnesses, OCR has determined that the district violated Title IX and its implementing regulation at §§106.31 (b) (1-4) and (7), in that it failed to take timely and effective responsive action to address sexual harassment which denied female students, because of their sex, equal educational services, with respect to the issues raised by this investigation. The district, however, voluntarily entered into a settlement agreement to resolve the violation cited above. The basis for OCR's determination is summarized below.

REGULATORY AUTHORITY

The regulation implementing Title IX at 34 C.F.R. §106.31(b) prohibits discrimination on the basis of sex in the provision or the enjoyment of any aid, benefit, or services offered in the educational programs and activities operated by the recipient. The Title IX regulation at 34 C.F.R. §§106.31(b) (1) through (4) and (7) prohibits harassment that, on the basis of sex, results in a denial or limitation of any aid, benefit or service. Sexual harassment is defined as verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or student, which is unwelcome, hostile, or intimidating.

Under Title IX and its implementing regulation, a recipient is directly responsible for the discriminatory acts of its employees. A recipient also violates Title IX when it knew or should have known that a sexually hostile environment exists due to student-to-student harassment and fails to take timely and effective corrective action. A sexually hostile environment is created by acts of sexual nature that are sufficiently severe or pervasive to impair the educational benefits offered by the recipient. The existence of a sexually hostile environment is determined from the viewpoint of a reasonable person in the victim's situation. In determining whether sexual harassment exposes students because of their sex to a hostile environment, relevant circumstances include the age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the act(s) of harassment; the nature and context of the incident(s); whether the conduct was verbal or physical; whether others joined in perpetuating the alleged harassment; whether the harassment was directed at more than one person; and whether the alleged incidents created an offensive, hostile or abusive atmosphere at the district or at specific schools or in other district settings, such as school buses.

FACTS

As of April 1991, the district had a formal policy prohibiting sexual harassment of students and employees. Under the procedures stated in the policy, the principal of each school is responsible for handling all reports of student-to-student sexual harassment pursuant to the Code of Student Conduct (Code). As amended in March 1992, the Code contains corresponding provisions for handling student-to-student sexual harassment. Pursuant to these provisions, reports of sexual harassment are to be forwarded in writing to the executive director of personnel (director of personnel), the school official designated to coordinate the district's sexual harassment policy. The principal or designee is to conduct an investigation which may include contacts with the parents of all of the students involved and interviews with the parents of all of the students involved and interviews with the individuals identified as having possible information about the incident. Possible responses to a completed investigation include disciplinary sanctions, requiring an apology, provision of social work services, recommendations to protect the victim, staff, or other students, and a combination of these or other appropriate actions. District

records indicate that these procedures were applied on a number of occasions in 1989-90 and 1991-92; no incidents were reported in 1990-91.

The policy defines sexual harassment, inter alia, as inappropriate verbal or physical contact of a sexual nature, including verbal harassment or abuse, which has the purpose or effect of interfering with an individual's education or creating an intimidating, hostile, or offensive environment. When questioned by OCR in November of 1992, district personnel acknowledged that in prior years they considered the district's sexual harassment policy to apply to student-to-student interactions that involved only overt displays of sexual aggression or unwelcome solicitation, particularly physical contact. Other incidents of offensive sexual language and behavior, particularly those involving preadolescent students, were treated as disciplinary infractions under the category of "inappropriate behavior or language."

OCR's investigation identified several major instances in which student-to-student sexual harassment was brought to the district's attention during the 1991-92 school year. Student A, who was six years of age during 1991-92, attended Cedar Ridge Elementary School. On March 9, 1992, the complainant telephoned the district's transportation department to complain about foul language being used by students on her daughter's bus in January and February 1992. The examples given at this time were not overtly sexual. The complainant identified three boys (students 1, 2, and 3) as the primary perpetrators. Students 1 and 2 were nine years old at the time; student 3 was six years old.

The coordinator of the transportation department (coordinator) responded to the March 9 telephone call by riding the morning and afternoon buses on March 10. He did not hear profanity but observed disruptive behavior. The bus drivers reported that although they were unaware of foul language, they could not hear beyond the first few rows of seats.

During his afternoon ride the coordinator talked to a number of students who told him that some children swore and named students 2 and 3, and possibly others. The coordinator warned all students that discipline would be imposed for swearing and admonished those children who had been singled out by others. He also informed the principal of Cedar Ridge about the alleged foul language and misbehavior by students he observed. The coordinator stated that he did not interview the complainant's daughter as he viewed the complaint as general in nature. The coordinator indicated that he telephoned the complainant at the end of the day to discuss his observations.

The complainant informed OCR that in her March 10 telephone conversation with the coordinator she identified two other fourth grade boys as involved; the coordinator told OCR he could not remember whether the complainant had mentioned any students other that students 1, 2, and 3 as responsible for the foul language.

On March 10, the coordinator also called the Cedar Ridge principal to report the complainant's concerns and his own observation after riding the bus. The principal indicated that she had just assigned student 1 a one-day suspension and student 2 a one-hour detention for disruptive behavior of a nonsexual nature reported by the afternoon driver on discipline slips on March 9. Both boys had been written up many times since the beginning of the year for disruptive behavior and rules violations. On or about March 10, the principal also talked with student 3 and another boy who she said has also been mentioned as a troublemaker about the need for appropriate language. The latter student is not one mentioned to the coordinator during the telephone call.

On March 18, 1992, the complainant wrote to the coordinator describing specific incidents of explicit sexual and abusive language and conduct on her daughter's bus. In one instance, her daughter and another female student were chased off the bus by a male first-grade student who called them a derogatory sex-related name. The complainant reported that the girls were screaming and in tears. This incident was witnessed by the complainant's day care provider who told OCR that the girls were hysterical. According to the complainant's letter, the same boy also teased the two girls about their sex organs. The complainant further stated that within the last week student A had reported to her the latest expletive used by boys on the bus and that one of the boys had told her daughter in graphic slang terms to perform sex acts with her father. Although the letter does not use the term sexual harassment, it is apparent that the complainant was concerned about the effect the constant exposure to such language and behavior would have on her daughter.

The complainant again wrote to the coordinator on April 27, May 8, and May 26, 1992. Her letter of April 27 specifically characterized the problems on the bus as sexual harassment, and her letters of May 8 and 26 reported additional incidents of sexual harassment.

The May 8 letter reported that boys on the bus were making lewd jokes about male anatomy. Her letter of May 26 reported that boys on the bus were tormenting the girls by pointing and shoving big rubber knives at them, pretending to stab them. The complainant reported that her daughter began to cry when she recalled the incident. Use of foul language by the boys against the girls was also cited. Taken together, the complainant's letters charged that boys riding with her daughter subjected girls to a pattern of overt sexual hostility accompanied by actual or threatened aggressive physical contact and the repeated use of obscene or foul language, including offensive sexual slurs and epithets and other obscene sex-neutral words or expressions directed at girls in a hostile manner.

At no time did the district treat the complainant's correspondence as alleging a violation of the district's sexual harassment policy. The coordinator acknowledged that, while he did not investigate any of the specific incidents cited in the complainant's March 18 correspondence, he assumed that the incidents had occurred as reported. The coordinator indicated he had been told by the day care provider about the incident in which the girls were chased off the bus while being called derogatory sex-related names. However, he also stated that he had not investigated the two most recent incidents, which the complainant indicated had occurred after March 10, involving the use of expletives and the lewd reference to an incestuous sex act with student A's father. The coordinator indicated that he did not undertake further investigation as he believed that the same three boys earlier identified were involved in these incidents and he had already set in motion a process for improving conditions on the bus. He expected improvements to come about, as he discussed in subsequent memoranda and correspondence, through keeping the principal advised of the problems, counseling and support for the driver, stricter enforcement of the district's discipline rules, and continued monitoring by the transportation department.

Subsequent incidents of harassment reported by the complainant or other adults were similarly treated as instances of inappropriate language or behavior and responded to in that manner. The district does not dispute that the behavior cited in the complainant's letters of May 8 and May 26 occurred; however, it contends that the transportation coordinator looked into the complainant's charges of lewd jokes and the use of foul language against the girls, but that the misbehavior could not be lined to specific students. In keeping with the usual procedures employed by the transportation department, the district's

investigation consisted of checking with the bus drivers regarding their knowledge about the allegations, of observing the children at the bus stop, and of discussions with the students at the bus stop or on the bus. A transportation department employee indicated that she was asked to ride the bus in May but was not told the reason for the assignment or given any information about the problems reported. There is no indication that students, including the complainant's daughter, were questioned privately. Moreover, since no records were kept of the investigation of these particular incidents or contemporaneous reports made, it is impossible to determine whether all leads were pursued or possible witnesses examined.

One of the other incidents reported by the complainant on May 26, 1992 involved boys frightening the girls pretending to stab them with rubber knives. The district claimed that the incident had been reported by another parent and that the bus driver had warned the boy responsible. However, there are no discipline slips relating to this incident. Further, when questioned by OCR, neither the morning nor the afternoon bus driver recalled such an incident. The afternoon bus driver told OCR he recalled that the coordinator questioning him about this incident, but the driver had no recollection of seeing a knife or admonishing a student for brandishing one.

On June 1, it was reported by the driver and a parent that student 2 pushed students and threw rocks at them, grabbed a girl's crotch and made sexually hostile, obscene remarks to her and another female student. No formal report was made of the parent's expression of concern.

The district contends that the boys responsible for the misbehavior on the bus were disciplined. In April 1992, at an individualized education program (IEP) meeting held for student 1, district staff decided that the student would ride the special education bus for the remainder of the school year because of his escalating behavior problems. Similarly, on June 2, 1992, district staff decided to place student 2 permanently on the special education bus. Student 3, also identified by the complainant as a chief perpetrator, was, as mentioned earlier, counseled by the principal on or about March 10, about his bad language. District records also reflect that he was assigned a detention on March 17 for writing an obscene word on the bus window.

District records confirm that students 1 and 2 received detentions and suspensions for their disruptive behavior on the bus. With the exception of student 2's removal from the school bus for other actions taken against these two students pertained to the sexual harassment and use of obscene language which the complainant had reported in her correspondence. Further, with the exception of the detention imposed for the March 17 incident, student 3 received no disciplinary sanctions for acts of sexual harassment.

In addition to the incidents reported by the complainant or other parents, district records show that two other students were cited for making vulgar gestures or swearing on April 21; these slips do not show that any disciplinary sanctions were imposed.

During spring 1992, the district attempted various efforts to improve student behavior on student A's bus route. In April, the Cedar Ridge school newsletter published a reminder about the discipline procedures and consequences for violating the school rules. The coordinator continued to observe students at selected bus stops and to keep in contact with the drivers. On May 11, the transportation director and Cedar Ridge principal boarded student A's bus and specifically warned the students not to use profanity. However, these efforts failed to stop the harassment.

In written responses dated March 31 and June 1, 1992, to the complainant's letters, the coordinator reported that disciplinary action had been taken against students 1 and 2,

and acknowledged that it was taking longer to curb the inappropriate behavior than hoped. In a letter to the complainant, dated June 4, 1992, the superintendent further acknowledged the problems that her daughter had experienced on the bus. He indicated that further corrective action would be taken in fall 1992.

In fall 1992, the director of the transportation department met with the complainant to select an experienced bus driver for her daughter's route for the upcoming school year. The complainant has not reported any problems involving sexual harassment during the 1992-93 school year.

OCR also found that similar problems were experienced by female students on another bus route in the district. Parent A has two daughters who attended Forest Hills Elementary School during the 1991-92 school year; student E was in first grade, and student F was in fourth grade. Parent A told OCR that whenever student F was sick, student E did not want to go to school because she was afraid to ride the bus alone. Both girls were reportedly teased about their anatomy, shoved, touched, and called obscene, sexually derogatory names while riding their school bus. One boy in particular, student 6, was said to be responsible for much of the trouble. In fall 1991, three parents, including Parent A, who were concerned about these problems together called the transportation department to complain about student 6. Parent A told OCR that she specifically mentioned touching, pushing and vulgar language. Parent A ultimately decided to drive her daughter to school as the situation did not permanently improve. The district, however, did not retain records of complaints regarding bus problems other that in student A's case, and the coordinator could not recall receiving the complaint about this other bus route. Parent A asserted that, had she known about the district's sexual harassment policy when she lodged her complaint in fall 1991, she would have emphasized the sexual nature of the problem and pursued the matter more vigorously.

Another incident of sexual harassment brought to the district's attention occurred at Oak Point Intermediate School. According to district records and witness statements, on May 5, 1992, during recess, student G, a female sixth grader, was tripped, spit on, and subjected to hurtful, lewd remarks about her anatomy by five male sixth graders (students 7, 8, 9, 10, and 11). According to her parents, student G was quite upset by the actions of the boys because, as a young girl entering puberty, she was very sensitive about the development of her body.

The Oak Point principal determined that the male students had used inappropriate language, misconduct identified under the severe clause of the school's assertive discipline program. Use of the severe clause allows imposition of a greater penalty than would otherwise be applicable under the progressive discipline plan.

The principal informed OCR that she characterized the actions of the five male students as inappropriate language rather than sexual harassment because this is how she has always dealt with such behavior. She contacted the boys' parents about the incident and assigned each of the boys a one-hour detention; student 7 received three additional days of suspension based on other misbehavior of a nonsexual nature on May 5. The principal told OCR that the one-hour detention was based on the students' prior disciplinary history and the nature of the offense. She indicated that she would now view the incident as sexual harassment.

A review of the discipline files of the five male students who had harassed student G revealed that all of them had a history of violating school and bus rules during the second semester of the 1991-92 school year. Student 7 had been reported by his bus driver and other school personnel for profanity, swearing or sexually harassing behavior on eight other occasions between November 1991 and June 1992. Five of these incidents occurred on the bus between March and June

4, 1992. Consistent with the school's assertive discipline plan, the student was suspended from the bus for three days in April for various acts of misconduct, one of which included swearing, and was again suspended for three separate five-day periods in April and May; two of the May suspensions were in response to sexually suggestive or harassing language. The student also received a one day suspension in June for making inappropriate remarks of a sexual nature in a classroom; at that time he was already being disciplined at the highest step of the assertive discipline plan. After each bus suspension, the student would return to the bus and repeat or exacerbate the behavior. Although the district was in the process of beginning the assessment required for special education eligibility, there is no indication that measures were instituted to oversee the student on the bus or to isolate him from other students until more permanent measures could be taken.

Inadequate handling of sexual harassment charges was also alleged by parents at the Central Middle School. Parent E reported that at the beginning of the 1991-92 school year her daughter, student H, was subject to verbal abuse at the bus stop; she was continually teased about being flat-chested. When Parent E called the transportation department to complain, she said she was told that the bus driver could not do anything about the teasing because it did not occur on the bus. The district does not have a record of this call, and the coordinator did not recall receiving such a complaint. He stated that the district has no official jurisdiction over the bus stops but does attempt to deal with behavior problems occurring at these locations.

Parent E also reported that her daughter was propositioned in the school hallway at her locker; the boy allegedly offered student H various amounts of money to perform sex acts. Though the incident was allegedly reported to the Central Middle School principal by the building janitor, in interviews with OCR, neither the principal nor the janitor recalled the incident. Parent F, whose daughter was also propositioned by the same boy, substantiated Parent E's report. Both parents indicated to OCR that the principal had called them to discuss the matter, indicating that the principal was aware of the situation. The district's file, containing six sexual harassment reports for 1991-92, does not include this incident.

In May 1992, during a social studies class, a seventh grade male (student 13) repeatedly made remarks of a sexual nature regarding male and female anatomy and various sex acts to three seventh grade female classmates (students B, C, and D). Student 13 is the same boy reported by Parents E and F to have propositioned their daughters. The female students reported that four other girls were also harassed by student 13 in the social studies class. Student 13 also touched the girls and, on one occasion, physically restrained one of them so that she could not escape his lewd remarks. According to the female students, the teacher witnessed the harassment, but was unresponsive to their requests for assistance. The teacher's response was to offer to change the boy's seat. According to the students, the boy's seat already had been changed numerous times as girls reported that he was bothering them.

During mid-May 1992, students B, C, and D reported these incidents to a school social worker and a guidance counselor who advised the girls how they might handle the problem and discussed the matter with student 13. At least a week elapsed before the principal met with the girls and the boy after having been advised of the problem. At this meeting, the male student denied the accusations. According to the principal, a few days later, the female students presented an obscene note which they believed had been written by the male student. The note contained sexually explicit language and suggested that the writer and the reader perform a particular sex act. After examining the note, the principal

met with the three girls and suggested the possibility that one of them could have written the note. On May 21, 1992, the principal met with the male student who denied writing the note; the principal stated that the student was suspended from school for one day for his inappropriate behavior while in the social studies class.

In August 1992, student B's mother discussed with the sex equity coordinator for the Minnesota Department of Education (MDE) her dissatisfaction with the principal's handling of the May incident. The MDE coordinator called the district's director of personnel about the incident. The director told OCR that she had not been informed about the incident as required by the district's sexual harassment policy. On August 22, 1992, the superintendent sent the principal a memorandum criticizing him for failing to report the incident as sexual harassment pursuant to the district's sexual harassment policy. Because the director of personnel was concerned that the principal had not handled the matter appropriately, the district had its attorney conduct an independent investigation of the complaint. As a result of the investigation, on October 30, 1992, the district issued the principal a Notice of Deficiency. The specific deficiencies discussed in the letter were the principal's inappropriate response to the students' sexual harassment complaint, his failure to use good judgment, and omissions apparent in his investigation. The district also relieved the principal of any responsibility for processing sexual harassment complaints at the school, assigned a female administrator in the building to these responsibilities, and instituted procedures to ensure timely responses to sexual harassment complaints.

No disciplinary action was taken against the teacher nor was any further disciplinary action taken against the male student. At the end of the 1991-92 school year, the teacher retired and student 13 transferred to an out-of-state district.

Since the beginning of the 1992-93 school year, there has been an extensive campaign to inform district employees, parents and students about the district's policy on sexual harassment and the procedures for notifying the district of alleged violations. As a result, the evidence shows that students are more aware of their rights relative to sexual harassment by other students. The sexual harassment policy was also revised in August 1992 to emphasize that charges of student-to-student sexual harassment must be reported to the director of personnel and investigated under the policy.

In August 1992, district administrators attended an all-day training session on sexual harassment. In October 1992, all bus drivers attended a two hour training session on this topic. From September to November, each school conducted at least one lengthy staff training session on sexual harassment led by an attorney, the director of personnel, or an outside expert.

The district has also held sessions to discuss sexual harassment with students beginning at the fifth grade and has offered opportunities for parents to discuss the issue. Dissemination of the district's sexual harassment policy now reaches all parents in a meaningful manner. The district's curriculum and curricular materials have been reviewed and include, as appropriate, the issue of sexual harassment and gender fairness. For younger elementary school students, this includes discussion of self-respect, teasing, and tolerance for individual differences.

The district has also strengthened its program for maintaining good behavior on the buses. At the beginning of the current school year, the district distributed a new bus behavior pamphlet to parents, which contains a prohibition of sexual harassment, and instituted incentive awards for good behavior on the bus. In addition, the district formed a parent-school advisory committee on transportation issues.

The director of transportation indicated that these actions were taken in response to the concerns raised by the complainant.

For the first ten weeks of the 1992-93 school year, the district's director of personnel received copies of more than 50 written sexual harassment complaints. These incidents included verbal abuse and inappropriate touching, patting or pinching. Information gleaned from the student complaints shows that school staff investigated the reports. In most instances, the district appeared to have taken appropriate action. The district's responses included counseling the offending student, contacting the parent of all students involved in the incident, giving the offending student a one-hour after-school detention, and/or referring the student for social work services.

However, review of all of the sexual harassment reports forms for 1992-93 reflects a continuing confusion as to what types of behavior constitute sexual harassment. The forms are being used by some students to report any behavior by another student that they find objectionable. Thus, incidents of name-calling between students of the same sex are included in the reports as well as an incident of harassment of a student because of the student's disability. In addition, the forms themselves frequently do not include sufficient specificity as to the behavior alleged or the behavior found to have occurred to determine whether sexual harassment was involved. Moreover, the forms do not contain an express finding as to whether sexual harassment occurred.

During the first 10 weeks of 1992-93, there were 15 reports of sexual harassment on the bus from drivers and parents of bus users. This group of complaints does not include any repeat violations. Instances of reported harassment included five instances of male students touching another male student's private parts, one instance of a boy grabbing the crotch of a girl and a boy, and a few instances of objectionable comments about sexual activity or sexual attributes. The age of the elementary school students involved in the touching was not always given, making those incidents difficult to evaluate.

ANALYSIS

OCR evaluated the incidents cited above to determine whether female students had been subjected to sexual harassment and whether the acts of harassment were sufficiently severe or pervasive to create an intimidating, hostile, or offensive environment for the female students. The preponderance of the evidence established that eight females, students, A, B, C, D, E, F, G, and H, were subjected to multiple or severe acts of sexual harassment resulting in a sexually hostile environment. The harassment included explicit, offensive sexual references and name calling directed at the girls, unwelcome touching, physical contact and intimidation, and taunting. The hostile environment arose in several locations, including district bus routes, a playground, school hallways, and a classroom.

From the standpoint of a reasonable female student participating in district programs and activities in these locations, the sexually offensive conduct was sufficiently frequent, severe and/or protracted to impair significantly the educational services and benefits offered. In some instances boys in primary grades engaged in sexually hostile words and conduct against equally young girls. The fact that neither the boys nor the girls were sufficiently mature to realize all of the meanings and nuances of the language that was used does not obviate a finding that sexual harassment occurred. In an educational setting, sexual harassment may result from words or conduct of a sexual nature communicated in a manner that would, under the circumstances, offend, stigmatize, or demean the student against whom the harassment is directed, on the basis of sex. In this case, there is no question that even the youngest girls

understood that the language and conduct being used were expressions of hostility toward them on the basis of their sex and, as a clear result, were offended and upset.

In some circumstances, the impact of sexual harassment was heightened by its occurrence in areas where the students' ability to avoid the misconduct was restricted. With respect to student A and the other girls on the bus, the conditions of the bus ride were particularly offensive and severe because of the age of the students and because the girls were confined to the bus and unable to escape their harassers.

In the case of five of the eight female students, there is no dispute that the district had actual notice of the existence of a sexually hostile environment sufficient to raise a duty to take adequate corrective action. In these instances, the concern was conveyed to responsible district personnel by the students affected or their parents. In the other three instances, there is evidence that the harassment was reported; however, the reports cannot be corroborated through district records or testimony.

OCR next evaluated whether the district took sufficient action to respond to the hostile environment which existed for students on the Cedar Ridge bus and whether its actions with respect to other instances of sexual harassment complied with Title IX requirements.

OCR determined that the actions taken by the district in response to information indicating sexual harassment on the Cedar Ridge bus did not succeed in abating the hostile environment. The district received notice of the sexual harassment as of the complainant's March 18 letter which described incidents of sexually derogatory and abusive language and actions directed at female students. Although the district attempted in good faith to address the complainant's concerns, the evidence shows that harassment continued until the end of the school year. As detailed above, reported acts of sexual harassment occurred in February, during the week of March 10 to March 18, again in early and late May, and in early June at the end of the school year. In addition, acts of misconduct involving use of profanity and vulgar gestures were reported by one of the bus drivers in April, which, in the context of the hostile environment already created, could be expected to add to the female students' feelings of discomfort. In correspondence to the complainant, district officials themselves acknowledged that their immediate efforts to curtail the problems were insufficient to stop the harassment.

OCR determined that the district's response during this period was flawed by its failure to treat the incidents as possible sexual harassment and to follow the related procedures. As indicated above, the complainant's correspondence of March 18 contains specific incidents of student-to-student sexual harassment not mentioned in the initial telephone conversations between the complainant and the transportation department as well as incidents which occurred after the date of the call. However, the transportation coordinator did not attempt to question the complainant about the incidents involved or conduct a further investigation. His response reflected his belief that the approach used to respond to the complainant's original expressions of concern about foul language continued to be appropriate for the new allegations.

But since the original response was not focused on ascertaining whether particular incidents occurred, identifying all of the students responsible, which female students were adversely affected and to what extent, whether the behaviors at issue constituted sexual harassment, and, if so, what specific responsive measures were necessary, these questions remained unanswered. The initial investigation of the problem by the coordinator did not satisfy the criteria for a complete and thorough investigation: questioning of students was done on the bus without the privacy necessary

to enable students to talk freely without worrying about "tattling," no records were kept of the discussions with students, the complainant's daughter was not questioned, the identity of all of the students identified as possible perpetrators was not established, and the nature and scope of the problem itself was understood only as swearing or bad language rather than harassment directed at female children.

Similarly, complete investigations of sexual harassment reported by the complainant on May 8 and May 26 were not conducted in that private interviews of possible student witnesses were not conducted and no records were kept.

The drawbacks of the district's generalized approach to the situation are further underscored in the district's failure, at any time other than the incident of June 1, to establish culpability or forcefully discipline any of the particular students believed to be involved for behavior constituting sexual harassment.

The generalized approach taken by district personnel included specific actions which were intended to improve bus behavior, such as the appeal for parental cooperation, published in the school's April newsletter. However, the efforts did not stop the harassment and did not provide the degree of supervision necessary to respond to the situation. Close monitoring of the entire bus by the drivers was not possible. However, the district did not assign another adult to supervise the bus pending resolution of the problem. Additional supervision would be particularly appropriate where individual perpetrators could not be identified, or where, as the district asserts, the progressive sanctions which are a part of the schools' assertive discipline plans would not be effective. Another option not utilized by the district would have been to assign another driver to the afternoon route. The evidence indicates that the problems escalated after January 1 when a new driver who was not an effective disciplinarian was assigned to this route.

OCR also received reports from two other parents regarding the sexual harassment of their daughters on the bus. Although these parents indicated that they had reported the problem, it was not possible to corroborate this with District personnel as the records of bus complaints from 1991-92 were not kept. Under the district's sexual harassment policy, a record should have been kept of the report and an investigation conducted. The parents did not make formal complaints at least in part because they were unaware of the district's sexual harassment policy. Prior to 1992-93, the only notice given to parents of elementary school students, such as the parent of students E and F, was a brief statement regarding the prohibition of sexual harassment contained in the district's school calendar. Despite the lack of corroboration, these accounts tend to show the sexual harassment of girls participating in transportation services has occurred and that other parents in addition to the complainant were dissatisfied with the district's treatment of the problem.

In addition, a sixth grade male student on another bus was written up by the bus driver for inappropriate sexual language on seven occasions between November 1991 and June 1992. By May 1992, the student was suspended twice from the bus for periods of five days at a time. Each time the student returned to the bus, the behavior was repeated.

The district's response during 1991-92 to incidents at Central Middle School and Oak Point also reflects the district's failure to follow its sexual harassment policy. At the middle school, school officials and the teacher involved were slow to act to stop the harassment even though the boy involved had previously been involved in sexually harassing other female students during the same school year. The district did conduct full investigation of the shortcomings of the original response beginning in August 1992 after the director of personnel was informed by MDE that the policy may not have been followed. At Oak Point, school officials assigned

only a one-hour detention in a case of severe harassment by five boys, including one boy with a prior history of aggressive use of explicit sexual language.

The district has argued that greater tolerance of special education students' misconduct is necessary to achieve their individual educational objectives and to adhere to procedures legally required for students with disabilities. The district also contends that some special education students are more likely to engage in impulsive and unacceptable behavior, including behaviors that would constitute sexual harassment, and are, as a consequence of their disabilities, less likely to respond to progressive disciplinary measures. In this regard, the district notes that students 1, 2, and 13 were special education students and that student 7 had been referred for evaluation.

Under Title IX standards, a recipient may not act any less effectively to combat sexual harassment by special education students which interferes, on the basis of sex, with other students' receipt of the services offered by the recipient. The rights of students with disabilities can be respected through adherence to procedures required by federal law. There is no indication in the present case that the need to follow these procedures actually interfered with implementation of the district's sexual harassment policy. In any event, the rights of students with disabilities may not operate as a defense of behavior which singles out students, because of their sex, for adverse consequences.

During the 1992-93, the evidence shows that the district stepped up enforcement of its sexual harassment policy. The district's sexual harassment policy was amended to emphasize that reports of student-to-student harassment must be forwarded to the director of personnel and that school officials would be disciplined for not following this policy. Intensive training of administrators and staff to recognize the possibility of sexual harassment in student-to-student interactions and measures to notify students and parents of the district's sexual harassment policy were implemented. The district's curriculum and curricular materials have been reviewed and include, as appropriate, the issue of sexual harassment and gender fairness. The district has also strengthened its program for maintaining good behavior on the buses.

Procedures for identifying and reporting student-to-student harassment have also been strengthened. Students and staff are encouraged to report alleged harassment, and the district documents on the form the action taken. However, review of the sexual harassment report forms for 1992-93 reflects a continuing confusion as to what types of behavior constitute sexual harassment. In addition, the forms frequently do not include sufficient specificity as to the behavior alleged or the behavior found to have occurred to determine whether sexual harassment was involved. Most of the forms do not contain an express finding as to whether sexual harassment occurred. Moreover, although the director of personnel was made responsible for reviewing the adequacy of the administrators' responses, no specific procedures are in place to document that this function is performed.

The district also lacks guidelines which would assist building administrators to determine when a pattern of harassment or injury requires that more stringent sanctions be imposed. The district's code of conduct mandates that sexual harassment be treated under the "severe clause." Classification under the severe clause allows a more stringent punishment than might be permitted under the progressive discipline plan. However, review of the incident reports indicates that alleged harassment is not always treated under the severe clause. In addition, for students with extensive disciplinary histories, use of the severe clause does not lead to a more stringent punishment since these students are already at the higher steps of the plan.

OCR concluded that the failure to make express findings regarding the occurrence of sexual harassment constitutes a continuing violation of Title IX. The district contends that specific labeling of such incidents as sexual harassment is not necessary. However, OCR found that the failure to recognize the incidents as creating a sexually hostile environment for the students involved was seen by students and their parents as underestimating the injury which they experienced.

Based on the evidence as a whole, as of the end of the 1991-92 school year, the district had sufficient notice to conclude that a sexually hostile environment had arisen. While the district made an effort to respond, OCR found that the district's actions were not sufficient to eliminate completely the sexual harassment and its effects. The district has made additional efforts in 1992-93; however, these efforts remain incomplete. The district's sexual harassment policy is still not being implemented to require an express finding of sexual harassment. In addition, OCR is not persuaded that the district is now employing sanctions calculated to stop sexual harassment or provide an adequate degree of supervision where required. There was no indication of a change in procedures that would prevent repeated acts of harassment from occurring, as was the case with students 7 and 13 in 1991-92.

Based on the above OCR concluded that the district violated Title IX and its implementing regulations at 34 C.F.R. §§ 106.31(b) (1-4) and (7), in that it failed to take timely and effective responsive action to address sexual harassment which denied female students, because of their sex, equal educational services. The evidence shows that the district knew or should have known of the occurrence of the harassment but did not respond forcefully to end it.

Based upon written assurances that the district will implement the remedial actions set forth in the enclosed document, OCR considers the district to be presently fulfilling its obligations under Title IX and its implementing regulation with respect to the compliance issues identified during this investigation. The salient points of this plan include the district's agreement to: 1) develop written guidelines to assist its staff in making the determination that a student's misconduct constitutes sexual harassment; 2) document fully all allegations of sexual harassment and make an express finding as to whether sexual harassment has occurred; 3) develop guidelines to assist staff in determining the appropriate disciplinary sanctions for sexual harassment; 4) upon determining that repeated acts of sexual harassment are occurring in a particular district setting or activity, take additional affirmative steps to correct the problem, including the assignment of adult aides or monitors to supplement existing supervision; and 5) continue various actions it had already initiated, including notice to staff, parents, and students about its sexual harassment policy and procedures for filing complaints, implementation of the policy and reporting measures related thereto, provision of training and education on sexual harassment for staff and students, notice to parents of incidents of sexual harassment involving their children when allegations are not minor and, where appropriate, provision of counseling to victims of sexual harassment. In the settlement agreement, the district disclaims OCR's findings and represents that execution of the agreement does not constitute an admission of either compliance or noncompliance with Title IX.

This agreement, when implemented, will resolve the violation identified. Thus, OCR is closing this complaint effective the date of this letter. Continued compliance, however, is contingent upon carrying out the terms of the enclosed agreement. Failure to implement the settlement agreement may result in a finding of violation. As in our standard practice, compliance with commitments will be monitored by OCR in accordance with the time frames outlined in the settlement agreement.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

This letter of findings addresses only the issues discussed herein and should not be construed to cover any other issues regarding compliance with Title IX which may exist. Further, individuals filing a complaint or participating in an OCR investigation are protected against harassment, intimidation, or retaliation under 34 C.F.R. §100.7(e), which in incorporated by reference in the Title IX regulations at 34 C.F.R. §106.71.

If you have any questions about our determination, please contact Dr. Karen H. Viemeisel, Director, Elementary and Secondary Education Division, at 312-353-2480.

Sincerely,

Kenneth A. Mines
Regional Director

Enclosure

cc: Mr. Gene Mammenga
Commissioner of Education

July 24, 1992

REGION IX
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, California 94102

Dr. John D. Maguire
President
The Claremont Graduate School
160 East 10th Street
Claremont, California 91711

(In reply, please refer to Docket Number 09-92-6002)

Dear President Maguire:

The Office for Civil Rights (OCR), U.S. Department of Education has completed the compliance review of the Claremont Graduate School (CGS). The review addressed the compliance of CGS with Title IX of the Education Amendments of 1973. The specific focus of the compliance review was to determine whether CGS maintains an educational environment free from sexual harassment, whether CGS has responded to instances of sexual harassment against its students in a prompt and equitable manner, and whether CGS has implemented procedures to adequately address such complaints.

OCR has the responsibility for enforcing Title IX and the Department of Education implementing regulations, found at 34 C.F.R. Part 106. Title IX and the regulations prohibit discrimination on the basis of sex in education programs operated by recipients of federal financial assistance through

the Department. Since CGS receives such assistance, it is subject to the mandates of the statute and regulations. OCR found that the CGS was not in compliance with Title IX and its implementing regulations in a number of areas regarding its procedures to address sexual harassment complaints and notification to students of these procedures. However, CGS has provided OCR with written assurances to address these areas of non-compliance, as explained more fully later in this letter.

This Letter of Findings (LOF) represents a summary of the facts gathered during review, the applicable legal standards, and the compliance determinations made regarding the issues addressed in the compliance review.

Legal Standard

The implementing regulations for Title IX provide, at 34 C.F.R. section 106.31(a), that no person shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity. Under section 106.31(b), discriminatory treatment may include: different treatment in determining whether a person satisfies any requirement for the provision of an aid, benefit, or service (section 106.31 (b) (1)); providing different aid, benefits, or services or providing them in a different manner (section 106.31 (b) (2)); denying an aid, benefit, or service; (section 106.31 (b) (3)); subjecting any person to separate or different rules of behavior, sanctions, or other treatment (section 106.31 (b) (4)); and otherwise limiting any person in the enjoyment of any right, privilege, advantage, or opportunity (section 106.31 (b) (7)).

When individuals who are participating in a program or activity operated or sponsored by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others. A common working definition of sexual harassment in the education setting is: unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct where (1) submission to such conduct is explicitly or implicitly made a term or condition of the individual's education; or (2) such conduct has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment.

An educational institution may be found in noncompliance with Title IX and regulations as a result of such harassment if the harassment is sufficiently severe or pervasive to create a hostile or offensive educational environment. If those responsible for harassment are employees or agents of the institution, acting within the scope of their employment or agency, the institution itself will also be considered responsible for the harassment. If the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment. The institution will be considered to have responded adequately to knowledge of harassment if it conducted a thorough and objective investigation and took immediate action to fully remedy the harm that occurred and to prevent sexual harassment from occurring in the future.

Recipient institutions must also meet certain other specific legal obligations concerning internal grievance procedures and notification of a non-discrimination policy under 34 C.F.R. sections 106.8 and 106.9. Section 106.8(a) requires that the institution designate at least one employee to coordinate its responsibilities under Title IX, including investigation of any complaint of discrimination on the basis of gender, and notify all students of the name, office, address and telephone number of the designated employee(s). Under

section 106.8(b), the institution is required to adopt and publish a grievance procedure providing for the prompt and equitable resolution of student complaints alleging noncompliance with Title IX or its implementing regulations. Section 106.9 requires the institution to publish a notice of non-discrimination on the basis of gender in publications made available to students or applicants for enrollment which includes at least the following information: 1) that the requirement not to discriminate extends to both employment and admission, and 2) that inquires concerning the application of Title IX to the recipient may be referred to the employee designated under Section 106.8 or to the Office for Civil Rights (OCR). Postsecondary institutions are not required to maintain separate grievance procedures for sexual harassment. However if the institution elects to process sexual harassment complaints through a separate grievance procedure, that procedure must meet the regulatory requirements for notice and must also be a "prompt and equitable" procedure.

In addition, 34 C.F.R. section 106.31(d) imposes specific requirements upon any recipient institution which requires participation by any student in any education program or activity not operated wholly by such institution, or facilitates, permits or considers such participation as a part of or equivalent to an education program or activity operated by such institution. This section specifically applies to participation in educational consortiums. Section 106.31(d)(2)(i) provides that any such recipient institution must develop a implement a procedure designed to assure itself that the operator of the other educational program or activity takes no discriminatory action affecting any student which would be prohibited by 34 C.F.R. Part 106. Section 106.31(d)(2)(ii) provides that, if such discriminatory action occurs in the other educational program or activity, the institution shall not continue to facilitate, require, permit or consider participation by students in such program or activity.

Summary of Investigation

The Claremont Graduate School (CGS) is a private college and is one of six independent colleges in the consortium of the Claremont Colleges including CGS, Claremont, McKenna, Harvey Mudd, Pitzer, Pomona, and Scripps. Each college has its own faculty, board of trustees, separate campus and curriculum emphasis. However, the campuses are grouped closely together and CGS students participate in classes, work and utilize facilities on other campuses. The CGS offers the Masters and Doctors degrees in fourteen programs. The OCR compliance review included interviews of thirty individuals affiliated with CGS, including students, faculty members, staff person representatives from student organization and campus resource services, campus security, and administrators. OCR also interviewed administrators from the other colleges within the consortium. In addition, OCR reviewed CGS policies and procedures applicable to complaints of sexual harassment against students, and publications notifying students of these policies and procedures.

The CGS Sexual Harassment Policy (Policy) was adopted on April 29, 1991. The draft of the Policy was a result of a sexual harassment grievance filed by a student in October 1990. The Policy confirms that the CGS is committed to an atmosphere free from sexual harassment. It states that is the intention of the CGS to prevent, correct, and if necessary, discipline behavior which violates this Policy. The Policy defines the type of actions that constitute sexual harassment, and is consistent with the OCR definition of sexual harassment. The Policy lists, by title, the appropriate officials to receive reports of sexual harassment and states

that all reports of sexual harassment will be promptly investigated. An attachment to the Policy lists designated hearing bodies to handle sexual harassment complaints depending upon the status to the grievant and accused as a student, staff person, or faculty member.
The CGS catalog includes a sexual harassment policy statement. It reiterates the CGS commitment to maintaining an environment free from sexual harassment. It briefly defines sexual harassment and states that CGS will investigate reports of sexual harassment and take remedial action. The statement refers students to the Dean of Students for information about the policy. The Policy is made available to students through registration and through the Dean of Students.

In September 1991, the Claremont University Center (CUC) developed a sexual assault policy for use by the CGS and the Central Programs and Services within the CUC. The policy ensures that treatment, support, and information shall be provided to victims of sexual assault. The policy includes specific steps for reporting a sexual assault, securing a resolution, and accessing campus resources for support. Subsequent to the OCR review, the CUC Personnel Director drafted a sexual harassment policy targeted toward employees. The policy was submitted to OCR for review and has not been published. The policy forbids any action by an employee towards another employee or student which could be construed as sexual harassment. Included in the policy are actions an employee can take; the contact persons for filing a complaint; and the procedure to be followed if the complaint is filed by a student or faculty against a staff or a staff against a student or faculty.

NON-DISCRIMINATION POLICY STATEMENT, DESIGNATION OF A TITLE IX COORDINATOR, AND NOTICE TO STUDENTS

The CGS student catalog includes a non-discrimination policy statement which prohibits discrimination on the basis of gender. The policy statement refers inquiries concerning Title IX compliance to the Dean of Graduate School Faculty/Vice President for Academic Affairs, but does not refer students to OCR. OCR found that the Dean of Students has also been designated as an employee to handle sex discrimination and sexual harassment complaints. The CGS written Sexual Harassment Policy explained below lists the Vice President for Academic Affairs/Dean of the Faculty, Dean of Students, and the Personnel Representative by title as contacts regarding complaints of sexual harassment. However, the names, location and telephone numbers of these designated employees are not listed. The CGS catalog also includes notices regarding the Sexual Harassment Policy and the Student Grievance Procedure. However, while these notices refer students to the Dean of Students, her name, telephone number and location are not included in the notices.

OCR found that the non-discrimination policy, as written, does not comply with the requirements of section 106.9(a) in that it fails to refer students to OCR for information regarding Title IX compliance, in addition to the designated CGS employee(s). OCR further found that CGS has designated several employees to coordinate its efforts to comply with Title IX, including investigation of complaints, as required by section 106.8(a). However, CGS has not properly notified students in the information regarding sexual harassment and complaint procedures of the specific names, office addresses and telephone numbers of these designated employees, as required by section 106.8(a).

RESOLUTION OF COMPLAINTS OF SEXUAL HARASSMENT

The grievance procedure requirement under section 106.8(b)

requires recipients to identify and resolve issues relating to Title IX compliance in a prompt and equitable fashion. In reviewing Title IX grievance procedures, OCR is not concerned with the particular type of procedure or whether the recipient has one or several procedures. In determining whether a recipient's grievance procedures meet the "prompt and equitable requirement under section 106.8(b), OCR will look at whether the recipient has included elements such as: 1) notice to students and employees of the procedure and where to file complaints; 2) a thorough investigation of complaints, including an opportunity for complainants to present evidence; 3) designated time frames for the investigation and resolution of complaints; 4) notice to complainants of disposition of complaints; and 5) the right to appeal findings.

Student Grievance Procedure

The CGS adopted the "Student Grievance Procedure" (hereinafter the Procedure) in May 1977. The Procedure is applicable for complaints of sexual harassment by student versus a student and student versus a faculty on the CGS campus. Students are directed to the Procedure by an attachment to Sexual Harassment Policy. The Procedure is published and available through the Dean of Students and a notice of its availability referenced in the CGS catalog. The catalog advises students to contact the Dean of Students for information regarding filing a complaint under the Procedure.

The Procedure contains definitions, time limits, and an opportunity to mediate the grievance prior to a hearing. The Procedure provides for a student to grieve on matters that are discriminatory on the proscribed bases, including sex. However, the Procedure provides that faculty judgment of academic performance is not subject to grievance procedures. Complaints must be filed within six months after the situation took place.

The steps in the Procedure include the following: an informal resolution; a formal grievance; a committee hearing; a recommendation to the Dean of CGS; and a written decision and notice to the parties. Each step is governed by time limits. The Procedure provides that failure on the part of the student to meet the time frames will be considered an abandonment of the complaint, but also provides for an extension of time frames. OCR was informed by CGS that the six month filing deadline is tolled once the student initiates the informal steps in the Procedure.

The informal resolution component of the Procedure requires that the student initially discuss the problem with the person involved in the dispute. If the problem is unresolved the student is required to consult with the Dean of Students and requests a meeting between the student, the accused party and the Dean of Students. If the complaint is not resolved at this meeting, both parties complete a statement of grievance form which is forwarded to the Committee on Student Grievances. This Committee holds a hearing at which each party presents statements and responds to questions. The Committee then makes a decision and recommendation to the Dean of the CGS. The Dean either agrees or disagrees with the Committee's recommendation and sends written notice of the disposition of the complaint to all parties. The Procedure provides an opportunity for an appeal of the Dean's decision to the President only if the Dean did not accept the recommendation by the Committee.

If the grievance can be resolved by mutual consent on the part of both parties before it comes to hearing, the Procedure outlines two provisions for a pre-hearing settlement. If the proposed resolution requires administrative action, it must have the approval of the Dean of CGS. If the proposed resolution does not require administrative action, the

resolution constitutes the final procedural step and no further complaints or defenses on the matter are heard.

OCR found that CGS has adopted and published a grievance procedure which addresses complaints of sex discrimination, including sexual harassment, filed by students against other students and faculty members. However, OCR found that the Procedure contains elements which fail to meet the "equitable" standard of section 106.8(b). The Procedure excluded grievances concerning faculty decisions on academic performance. This limitation does not allow any avenue of redress if the student believes the decision is discriminatory on the basis of sex, such as instances of quid pro que sexual harassment which involve grading decisions.

In addition, the Procedure requires all grievants to discuss the problem directly with the other person involved in the complaint, first alone and then again with the Dean of Students. Because of the nature of sexual harassment and other allegations of discrimination, a mandatory requirement to meet with the accused prior to filing grievance is not equitable. Finally, the Procedure places a limitation on the complainant's opportunity to appeal a decision by the Grievance Committee, granting a right to appeal only if the Dean of the Graduate School disagrees with the Committee's decision.

Staff Grievance Procedure

The CGS student filing a complaint of sexual harassment against a staff member (i.e., non-student and non-faculty) employed at any of the Claremont Colleges or the CUC follows the "Staff Grievance Procedure of the Claremont Colleges" (Staff Procedure). Students are directed to the Staff Procedure by an attachment to the Sexual Harassment Policy which lists the applicable procedure for this type of complaint. The CGS Catalog does not contain a notice explaining the Staff Procedure as it applies to students.

OCR reviewed the Staff Procedure to determine if it met the requirements outlined in section 106.8(b) of the regulations. The Staff Procedure does not state that it is applicable to discrimination complaints. The Staff Procedure focuses on disputes between staff persons. The procedural steps list actions required of the employee/supervisor/department head, Personnel Representative, and Director of Personnel Services. Although the Staff Procedure is supposed to apply to CGS student complaints against staff, there is no inclusion of students in the process, as written. The Staff Procedure requires that an employee present his/her complaint to the supervisor within 10 working days after knowledge of the grievable condition, and lists seven steps, each with a specified time frame for completion. The steps include the following: an informal resolution; a formal grievance; a committee hearing; an investigation; and recommendation to the appropriate College President. The President makes a decision and notifies all parties in writing. The Staff Procedure has no provision for an appeal of the decision.

OCR found the Staff Procedure does not meet the requirements of section 106.8(b). The Procedure is not properly "published" in that, it does not refer to student complainants and how the different procedural steps apply to them and the catalog contains no notice directing students to this procedure. The Staff Procedure also includes elements which are not "equitable". The Staff Procedure does not state that discrimination is a basis for grieving and it does not contain language which includes the student as the grievant. The Staff Procedure does not offer student grievants the right to appeal which denies the parties an equitable resolution. While the Staff Procedure does set a time frame of ten days for filing a grievance, OCR finds the time period to be unreasonably short in the case of a complaint of sex discrimination, including sexual harassment..

Inter-campus Complaint Resolution

The CGS has a cooperative arrangement with the other five Claremont Colleges. The CGS students may attend functions, take classes, conduct research or serve as teaching assistants to professors at the other colleges. Students and professors from the other colleges can be affiliated with CGS by taking or teaching its graduate courses. Because of the inter-campus relationship, OCR interviewed the Deans of Students from the other five Claremont Colleges to understand how incidents of alleged sexual harassment are handled when they involve student, faculty, and staff from the different colleges. All the Deans stated that inter-campus complaints were reviewed under the grievance procedure at the college where the harasser was employed or enrolled. The Deans from the college of the victim and harasser would cooperate in the investigation of the matter.

However, OCR found that each college has its own grievance procedure for student grievances against other students or faculty and that there is no formal procedure which applies to inter-campus sexual harassment complaints, apart from the Staff Grievance Procedure which applies to all student complaints against staff persons. OCR reviewed the grievance mechanisms of the other five Claremont Colleges which would apply to complaints of sexual harassment by CGS students against a student or faculty member from another campus. OCR found the following problem areas in some of the procedures: no reference of applicability to complaints alleging discrimination, including gender discrimination; insufficient notice that the procedure applies to student grievants from other colleges; unclear filing deadlines; and no opportunity for the grievant to appeal a hearing decision.

OCR also found that CGS does not notify students through its Sexual Harassment Policy, student or staff grievance procedures, or catalog announcements of what procedure to follow or where to file an inter-campus complaint of sexual harassment against another student or a faculty member.

OCR was informed by CGS that a three-person subcommittee of the Deans of Students from the different Claremont Colleges formed in Fall 1991. The subcommittee was conducting a study to determine the feasibility of developing a uniform sexual harassment policy and grievance procedure for all the Claremont Colleges. The subcommittee submitted a draft of the six-college judiciary process to the Council of Presidents on June 1, 1992. Action on the matter will resume in Fall 1992.

The CGS obligation under section 106.8(b) to adopt and publish grievance procedures providing for the prompt and equitable resolution of student complaints extends to the instances in which CGS students allege sexual harassment by a student or professor of another college. CGS also has responsibilities as a member of an educational consortium under section 106.31(d). CGS students routinely conduct research, serve as teaching assistants and take classes from professors of other Claremont Colleges as a part of their educational program at CGS. Therefore, CGS must notify students of the specific procedure applicable to inter-campus complaints of sexual harassment, and ensure that the applicable procedure meets the "prompt and equitable" standard of section 106.8(b).

OCR found that CGS has not provided students with sufficient notice of the procedure for filing a complaint of sex discrimination, including sexual harassment, against a student or faculty member of another Claremont College. OCR further finds that, in practice, CGS refers such complaints to the college enrolling or employing the alleged offender. However, CGS has failed to ensure that each of the procedures utilized in the other five colleges provide for a

prompt and equitable resolution of a CGS student's complaint, as required by section 106.8(b).

NOTICE CONCERNING SEXUAL HARASSMENT ISSUES AND RESOLUTION OF SPECIFIC COMPLAINTS OR INCIDENTS OF SEXUAL HARASSMENT

The OCR review included interviews with a cross section of individuals to determine if the CGS community had an understanding of sexual harassment, if sexual harassment was sufficiently severe or pervasive to create an offensive educational environment, and if CGS responded adequately to reports or knowledge of incidents of sexual harassment. Other than those individuals who reported specific incidents to OCR, as noted below, witnesses interviewed had no reports of sexual harassment occurring at CGS. Most these individuals were knowledgeable about the existence of a grievance procedure and the contact person for filing a sexual harassment grievance. However, many of interviewees expressed a need to have a better understanding of what constituted sexual harassment and how to counsel individuals who might report these problems to them.

The CGS submitted written summaries of three sexual harassment complaints or incidents which occurred within the past three years. One of these complainants filed a formal complaint and OCR met with the complainant. OCR received four other incident reports verbally while on-site and by telephone.

Of the seven complaints/incidents, one was filed formally, four were reported to CGS personnel but handled informally, one was not reported and one is undergoing investigation by CGS after the police investigation was withdrawn. OCR found that, in majority of the incidents reported, the CGS personnel involved acted promptly and pursued appropriate resolution. In one instance, however, OCR found that the CGS initially failed to follow its own procedures in responding to the report of sexual harassment. In determining whether the CGS has implemented a "prompt and equitable" grievance procedure to address complaints of sex discrimination, OCR examines procedure and its application. In this instance, OCR found that the steps and time frames outlined in the Student Grievance Procedure were not adhered to in processing the student's expressed concern when she initially contacted CGS personnel. The complainant was not advised to file a grievance until almost a year later, when a Academic Dean took responsibility for addressing the complaint. The evidence established that the first three steps of the Procedures were not followed within the lines stipulated in that it took a year before the complainant was offered the option of a formal grievance. OCR finds that the lengthy delays in the grievance steps did not provide for a prompt resolution of the complaint.

However, once the new Academic Dean addressed the complaint, OCR finds that the procedure was adhered to. OCR found that the student was given an extension of the six month filing deadline due to the delay in addressing her concern. However, with regard to this particular complaint, a pre-hearing settlement was offered in a form of a meeting with the accused. The alternative options of the formal grievance hearing process and a meeting were discussed with the complainant subsequent to the filing of her complaint. The grievance was finally settled through a meeting which was mutually agreed upon between the student and the accused.

The facts established that the CGS ultimately resolved this problem when it provided an opportunity to the grievant to file a complaint and to settle prior to hearing. OCR determined that, once the grievance was reexamined, CGS

handled the grievance promptly and equitably. However, the initial delay in the process and failure on the part of CGS to follow its established procedures did not meet the prompt and equitable requirements of section 106.8(b).

Conclusion

OCR found CGS had failed to comply with certain procedural requirements of Title IX and its implementing regulations. These areas of non-compliance pertained to the mechanisms the school adopted to address allegations of sexual harassment. While the evidence did not indicate that sexual harassment is a prevalent problem at the CGS, OCR found that the CGS was not in compliance in the areas of its non-discrimination policy, notices to students, and grievance procedures. OCR discussed the compliance review finding with representatives of the CGS and negotiated a corrective action plan sufficient to remedy each area of noncompliance. A copy of the corrective action plan is enclosed as an attachment to this letter. This plan includes action by CGS to amend publication notices and grievance procedures, and to provide ongoing training on the issue of sexual harassment to CGS students, staff and administrators. Based upon this commitment and conditional upon its full implementation, OCR finds the CGS currently in compliance with Title IX as to the issues addressed in this letter.

The findings set forth in this letter pertain exclusively to the specific issues and individuals discussed herein. The findings are not intended, and should not be interpreted to express opinions as to the civil rights compliance of CGS with respect to any other individual or any other issue not discussed in this letter and do not preclude OCR from investigating any future allegation of discrimination.

Under the Freedom of Information Act, it may be necessary to release this document and related records on request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

We wish to thank you and your staff, especially Ms. Betty Hagelbarger for the cooperation extended throughout this review.

If you have any questions, please contact Pat Shelton, Branch Chief, at (415) 556-7021.

Sincerely,

John E. Palomino
Regional Civil Rights Director

Enclosure

MAY 5 1989

Mr. and Mrs.

California

(In reply, please refer to Docket Number 09-89-1050)

Dear Mr. and Mrs. :

The Office for Civil Rights (OCR) has completed its investigation of the complaint you filed against the Petaluma City (Elementary) School District and the Petaluma High School District (hereinafter District) alleging discrimination on the basis of sex. Specifically, you alleged that the District discriminated against your daughter, [ ], by failing to stop a group of boys from sexually harassing her.

OCR is responsible for enforcing Title IX of the Education Act of 1973, which prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. During the period of time applicable to the complaint, the 1987-88 school year, the District received Federal monies which create jurisdiction over the recipient. Because of the receipt of these funds, the District is subject to the requirements of Title IX and to the Departmental regulation implementing Title IX found at 34 C.F.R. Part 106.

OCR acquired information relative to the allegations from you and [ ], from several students and one of their parents, and from the superintendent, the assistant superintendent, the administrators and six of [ ]'s past teachers at Kenilworth Junior High School (KJHS), five other staff people at KJHS, [ ]'s summer school principal and also [ ]'s current counselor and school psychologist.

OCR found the District in violation of Title IX of the Education Act of 1973. The following material summarizes the legal issues relevant to this investigation and the evidence upon which OCR based its conclusions. At the end of this report is the remedial action to which the District commits itself in order to comply with Title IX. Based upon this commitment, OCR finds the District currently in compliance with Title IX.

Investigative Findings and Analysis

Findings related to the Procedures of the District

The Regulation implementing Title IX of the Education Act, at 104 CFR Section 106.8(a), requires that recipients designate a responsible employee to coordinate their efforts to fulfill the requirements of Title IX, and to notify students and employees of the existence of the Coordinator. The Superintendent has been designated as the Title IX Coordinator of the District and this fact is published in the annual newsletter which is mailed out to all parents of students in the District and placed in the mailboxes of teachers at school. By these actions the District is in compliance with Section 106.8(a).

Section 106.8(b) also requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints relevant to Title IX. The District provided OCR with copies of two grievance procedures which allow students and adults to file Title IX complaints within the District. OCR found that the procedures require complainants, including students, to have specific knowledge regarding the relevant policy and/or statute being violated and that the District has no procedure for publishing the

existence of these grievance procedures.
OCR found that the District grievance procedures placed an undue burden on grievants insofar as they required unsophisticated grievants, including students, to cite specific provisions of statute or policy in support of their grievances. OCR therefore found the District in violation of Section 106.8(b) for failing to adopt an "equitable" grievance procedure, as well as failing to publish these procedures.

Finally, Section 106.9 requires that a recipient notify applicants, students and parents, and employees that it does not discriminate on the basis of sex in its educational programs or activities, and also, that it is required by Title IX not to discriminate in such a manner. The District does notify the parents and staff that it does not discriminate by using the District newsletter. OCR finds the District in compliance with Title IX Section 106.9 in this regard.

Findings related to the Issue of Sexual Harassment

You alleged that [ ] was verbally harassed while she was an eighth grader at the KJHS, by a group of 15-20 boys, who taunted her by yelling "Moo, moo" and making blunt and colloquial reference to the size of her breasts. You alleged that that this abuse occurred early in the morning before school, during classes, during lunch time and after school. The complainant states that the harassment began in September of the 1987-88 school year and finally ended sometime during summer school in 1988.

Section 106.31 prohibits a District from denying a student the benefits of, or subjecting a student to discrimination on the basis of sex in any academic, extracurricular, or other program or activity operated by the district. A district may not subject a student to separate or different rules of behavior, sanctions, or other treatment, nor limit a person in the enjoyment of any right, privilege, advantage, or opportunity on the basis of sex.

Harassment of a student because of his or her sex may have the effect of depriving that student of benefits or of subjecting them to different treatment on the basis of sex. Sexual harassment of a student is generally defined as verbal or physical conduct which is sexual in nature, and which has the purpose or effect of unreasonably interfering with the student's ability to benefit from their education, or of creating an intimidating, hostile or offensive environment. Harassing conduct which is addressed at a student because of their sex, and which has comparable effects on the student, may also constitute sexual harassment. A district which is aware that its students are being subjected to sexual harassment has a duty under Title IX to take prompt and effective action to stop it.

In order to determine whether conduct between students constitutes sexual harassment for which a recipient may be held responsible under Title IX, OCR must consider four elements. First, it must examine whether the student has been harassed, and whether the harassment was based on, or related to, the student's sex. OCR next considers wheter the harassment is sufficiently prolonged or severe to interfere with the student's ability to benefit from their education or to create a hostile or offensive environoment. Third, it determines whether the recipient knew, or had reason to know, of the harassment. Finally, it examine whether the recipient took prompt and effective action in an effort to stop it.

Based on all of the interviews, OCR has concluded that the harassment did actually occur. In reaching this decision, OCR interviewed all witnesses identified by both you and the District. Many of these witnesses had observed students "mooing" at [ ] in front of the school, in the cafeteria, in the school yard, and in classes. There can be no

doubt that the conduct occurred, and that it continued to occur over the course of more than a year.

OCR further concludes that the harassment was sexual in nature. You and some witnesses, including some students and the summer school principal, stated that that the sounds were expressly intended to refer to [ ]'s bust size.[1] The superintendent also implied the sexual connotation of the boys' teasing [ ] by telling OCR that he had heard that [ ] provoked the harassment by the tight clothes which she wore. (No one else's testimony, nor the OCR investigator's observations, supported this allegation.) While other witnesses did not perceive a direct reference to bust size, all indicated that the "mooing" was a response to [ ]'s body. All of the adults OCR interviewed perceived this harassment as "teasing" rather than sexual harassment, and may not have responded decisively because of this perception. Nevertheless, OCR concludes that sustained references to a student's body in comparison to the body of a cow necessarily constitute verbal conduct of a sexual nature.

OCR also concludes that the harassment created a hostile environment which had an adverse effect on [ ]'s ability to benefit from her education. The harassment clearly upset her. You stated that [ ] was very depressed and even wrote a suicide note. You took [ ] to a psychiatrist for help and then enrolled [ ] in group therapy sessions for girls. The testimony of the noon supervisor and two women teachers indicates that [ ] confided in them, crying about the suffering she felt from the

[1] One of the students whom OCR interviewed was obviously embarrassed with the sexual nature of this question and was reluctant to answer. OCR is therefore not sure if all of the students felt comfortable enough to describe the harassment as other than related to being overweight.

harassment. A high school psychologist's report on [ ] states that she reported that she had been teased incessantly about her figure and consequently was having difficulty with peers. Other teachers and counselors reported that [ ] has an ongoing problem of low self-esteem, which they viewed as unrelated to the harassment, and to which they attributed her academic and emotional problems. Without attempting to apportion the reasons for [ ] social or academic difficulties, OCR concludes that the harassment created an environment which found hostile and intimidating, and that it adversely affected her self-esteem and her ability to benefit from the school.

Based on the testimony of the staff, OCR concludes that the District knew about the sexual harassment. Several staff members, including [ ]'s history teacher, the head custodian and a noon supervisor, directly observed the harassment. The assistant principal's testimony indicated that she was aware of the harassment as early as the 1986-87 school year and had witnessed it in the cafeteria and in the school yard. The evidence indicates that the principal was informed of the harassment on least four occasions: once by a substitute, to whom your daughter had complained, once by the head custodian, and twice by you. The knowledge of these individuals created a duty on the part of the District to take action to end the harassment.

OCR concludes that, although the District did respond to reports of the harassment, it failed to take sufficient appropriate action. When confronted with direct evidence that individual students had "mooed" [ ], the principal followed the school's disciplinary policy, verbally reprimanded them, warned them of future suspension for continued violations and enlisted their parents to continue the counseling at home. However, the principal's actions were insufficient to stop the harassment. Although the principal told OCR that he saw each incident of harassment as a "one

time occurrence," he was aware of its continuing nature. The continuity of the harassment should have signaled the principal that the harassment was more serious than implied by a few isolated incidents. The principal assigned the head custodian to watch for the behavior on one day. Beyond that, however, there is no evidence that he followed up on the reports he received by asking school staff to watch for the problem until April or May of 1988, over a year after the assistant principal first became aware of the problem. Nor did the principal check with you or your daughter to ensure that the harassment had stopped.

Mr. [ ] told OCR that he never saw the harassment as sexual harassment but only as teasing. It appears that the assistant principal also treated the harassment as a series of isolated incidents of teasing, and did not coordinate her response to it with that of the principal.

You told OCR that the principal told you that he could not stop junior high school students from "teasing" one another and suggested that you remove [ ] from school for a home education program. The principal denied stating that he could not stop the teasing. However, he neither confirmed nor denied recommending a home program. Your allegation is supported by evidence that a prior victim of sexual harassment at KJHS had managed to escape the harassment only by transferring out of the school. A recommendation for a home program, if it were made, would be particularly inappropriate. It would bring about the end of the harassment only by denying the victim of harassment the benefits of an appropriate educational program while allowing the perpetrators to go without punishment. Moreover, such a recommendation might have violated the requirements of Section 504 of the Rehabilitation Act of 1973, and its implementing regulations, that students who are believed to need special education or related services be evaluated prior to a significant change in placement, and that they be placed in the regular program to the maximum extent appropriate to their individual needs.

OCR thus concludes that your daughter was subjected to sexual harassment, that the District knew of the harassment, and that, by failing to take prompt and effective action, the District failed to end it. Accordingly, OCR finds that the District subjected [ ] to discrimination on the basis of her sex in violation of Title IX.[2]

The District has agreed to take remedial action which, when implemented, will bring the District into compliance with Title IX. That remedial action is as follows:

1. The District has appointed Ms. Anita Morris, the personnel assistant, as the district-level Title IX Coordinator.

2. Notification of this appointment along with the appropriate contact telephone number will be disseminated in a summer newsletter to be circulated throughout the community in August of 1989 to the residences of all enrolled students in the District, and to all classified and certificated employees.

3. Each junior and senior high school has identified an individual at its school site who shall be responsible for issues related to Title IX.

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[2]OCR notes that not one administrator, teacher nor other staff person whom OCR interviewed ever interpreted this harassment as sexual harassment and none called or, by their own testimony, even thought of involving the Title IX Coordinator in these incidents. The District has informed OCR that it plans to increase the effectiveness of its Title IX coordination, by appointing a new Title IX Coordinator, by identifying individuals at each school site who shall be responsible for issues related to Title IX, and by publicizing the names and functions of these individuals to parents and staff members.

4. Notification regarding the identification of these responsible people, along with their contact telephone numbers, shall be announced to all staff by memos and/or meetings prior to the end of the 1988-89 school year, and to the respective school communities via school newsletter and bulletins.

5. The Board Pollicy 4020, Title IX Adult Grievance Procedures: Certificated Grievance Procedures: Certificated/Classified has been amended. The amended policy deletes the reference under Step I that the area of policy and/or statute applicable must be included in the initial written grievance by the grievant.

6. The amended Title IX Student/Parent Grievance Procedures will be submitted to the Petaluma Board of Education in May of 1989. This amended policy deletes the reference under Step I that the area of policy and/or statute applicable must be included in the initial written grievance by the grievant. It was inadvertently omitted from being submitted to the Board with the employee's grievance policy. Should the Board fail to adopt the policy, OCR will immediately reopen the complaint.

7. The District will provide in-service training and development to the staff related to Title IX issues in order to assure greater awareness and sensitivity by all staff and students to sex discrimination on or before November 6, 1989. The training procedures and materials will include: bulletins, newsletters and workshops on November 6, 1989, school site staff meetings during the spring and the fall of 1989, curriculum modifications or changes for the junior and senior high schools, and counseling regarding traditionally male dominated classes.

8. The presidents of the Petaluma Federation of Teachers and the California School Employees Association have piedged their support to the District to assist in the development and the implementation of the above described in-service training of the District staff.

Based upon the written commitment by the District to fully implement the above corrective actions, OCR finds the District now in compliance with Title IX of the Education Act of 1972. It should be noted that this compliance finding is contingent [sic] adoption of the amended Title IX Student/Parent Grievance Procedures and upon the complete and timely implementation of the necessary corrective actions. In order to determine whether the District has implemented its commitments, OCR requested that the District submit a report, regarding the same issues, to OCR by November 17, 1989.

These findings apply only to the specific issues and circumstances described in this letter and should not be construed as an interpretation of the District civil rights compliance as to any other students or issues.

Under the Freedom of Information Act, it may be necessary to release this document and related records on request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank you for your cooperation during the course of this investigation. If you have any questions regarding these findings, please contact Mr. Charles R. Love,

Director, Elementary and Secondary Education Division, at (415) 227-8054.

Sincerely,

John E. Palomino
Regional Civil Rights Director
Region IX